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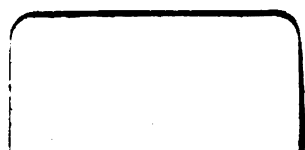
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THE  
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OF  
MRS.



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**A**  
**TREATISE**  
**ON THE**  
**STATUTE OF LIMITATIONS.**

(21 JAC. 1. c. 16.)

—●—  
**BY WILLIAM BALLANTINE, ESQ.**  
**OF THE INNER TEMPLE.**  
—◆—

**TO WHICH ARE ADDED,**  
**NOTES OF THE DECISIONS MADE BY THE SUPREME AND CIRCUIT COURTS OF**  
**THE UNITED STATES, AND BY THE COURTS OF THE SEVERAL STATES,**  
**WHOSE DECISIONS HAVE BEEN REPORTED,**  
**UPON THE**  
**LIMITATION OF ACTIONS AT LAW,**  
**AND OF**  
**SUITS IN EQUITY ;**

**AND**  
**NOTES OF DECISIONS MADE IN THE ENGLISH COURTS, TO THE PRESENT TIME,**  
**EXCEPT THOSE CITED IN THE TEXT :**

**TOGETHER WITH THE**  
**STATUTES OF LIMITATIONS OF THE STATE OF NEW-YORK ;**

**A SUMMARY**  
**OF THE**  
**STATUTES OF LIMITATIONS**  
**OF THE SEVERAL STATES, OF THE UNITED STATES, AND OF THE**  
**LAW OF PRESCRIPTION OF LOUISIANA ;**

**AND**  
**A CHRONOLOGICAL DIGEST**  
**OF THE**  
**ENGLISH STATUTES OF LIMITATIONS.**

—◆—  
**BY JOHN L. TILLINGHAST,**  
**COUNSELLOR AT LAW.**  
—◆—

**ALBANY:**  
**PRINTED BY B. D. PACKARD AND CO.**

.....  
**1829.**

*Northern District of New-York, to wit.*



BE IT REMEMBERED, that on the twenty-fourth day of July, in the fifty fourth year of the Independence of the United States of America, A. D. 1829, John L. Tillinghast, of the said district, hath deposited in this office the title of a book the right whereof he claims as author, in the words following, to wit: "A Treatise on the Statute of Limitations, (21 Jac. I. c. 16.) by William Ballantine, Esq. of the Inner Temple. To which are added notes of the decisions made by the Supreme and Circuit Courts of the United States, and by the Courts of the several States, whose decisions have been reported, upon the Limitation of Actions at Law, and of Suits in Equity; and notes of decisions made in the English Courts to the present time, except those cited in the text: together with the Statutes of Limitations of the State of New-York; a Summary of the Statutes of Limitations of the several States, of the United States, and of the Law of Prescription of Louisiana; and a chronological Digest of the English Statutes of Limitations. By John L. Tillinghast, Counsellor at Law."

In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned;" and also, to the act entitled "An act supplementary to an act entitled 'An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of Designing, Engraving and Etching historical and other prints."

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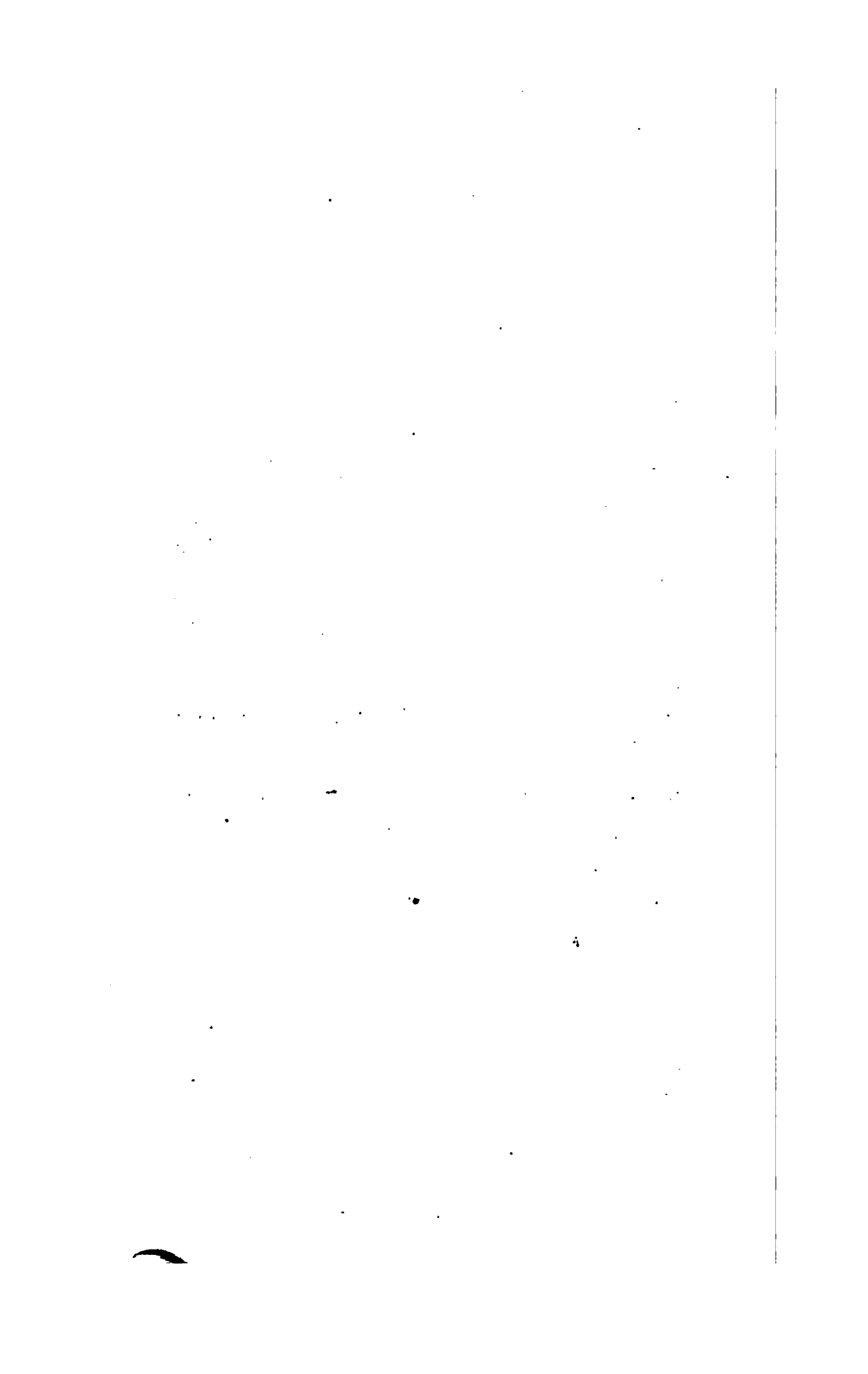
*Clerk of the District Court of the United States,  
for the Northern District of New-York.*

## ADVERTISEMENT.

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*In the following sheets, the decisions on the Statute 21 Jac. I. c. 16. have been collected and arranged. The limitation being restrictive of a common law right, general in its application, and conclusive in its effect, will be a sufficient apology for this attempt; and the rather so, because the intention of the Legislature is not manifested in the wording of the Act, as is proved by the many questions that have arisen on its construction.*

CROWN-OFFICE ROW, TEMPLE,  
21st. JULY, 1810.



## **PREFACE**

**TO THE PRESENT EDITION.**

---

At the time when this Work was commenced, Mr. Ballantine's "Treatise on the Statute of Limitations," was the only Book of the kind; but that, although deservedly esteemed as a valuable Publication, had been rendered partially inaccurate, by Decisions made in the English Courts, since it was written, modifying and altering in some essential particulars, what had previously been considered as the settled construction of the Law on that subject. Of the various important Decisions of the American Courts, upon the Limitation of Actions, it was believed that no collection or arrangement had been attempted.

The advantage to be derived from a knowledge of recent English Adjudications, is too obvious to require any remark; nor can the peculiar importance of the American Authorities, to Practitioners in the Courts of this Country, be a matter of doubt: and as the Editor of this Edition had been taught by actual experience, how great an expense of time and labour, was incurred, in searching through nearly three hundred Volumes, to extract the Law on this subject, he was induced to believe that a new Edition of Mr. Ballantine's Treatise, with notes of the Decisions made by the English Courts since that Treatise was written, together with notes of the Decisions, made in all those of the United States, which have caused the Proceedings of their Courts to be reported, would not be considered by his brethren of the Bar, as either useless or unacceptable.

Under these impressions, the preparation of the following pages for the Press, was commenced; after considerable progress had been made in the Work, it was understood that a Gentleman in one of the Eastern States, already favourably known as an Author, had it in contemplation to publish a Volume on



the same subject ; the work in question is now out ; but from a cursory examination, it is not supposed, that it will render the present Edition useless, especially in the State of New-York.

The Authorities cited in the following pages have been gleaned from a large collection of Books, of which but a few, comparatively speaking, are to be found in common Libraries ; for this reason, therefore, as well as from a desire to adduce the most satisfactory Authority for the positions which he has advanced, the Editor has preferred, wherever it was practicable, to give the Opinions of the Courts in their own words, rather than in his : and for the like reason the name of the Judge delivering the Opinion cited, and whether such were the Opinion of the Court, or merely that of the Judge individually, have usually been mentioned : so that in case of any conflicting Decisions, the Reader may be enabled, for himself, to scan the relative weight of the Authorities.

With a view of rendering the Decisions in the different Courts more readily intelligible, a Summary of the Statutes of the United States, and of the several States, limiting the time of commencing Suits, has been prepared and inserted in the Appendix. A Digest of the several English Statutes of Limitations, arranged in the order of time in which they were respectively enacted, has also been added.

Of the Statutes of Limitations of the State of New-York, only the first Acts passed after the American Revolution, together with those of the Colonial Government, have been digested ; The Statutes of Limitation now in force, have been inserted *at Large* ; But, as the *Revised Statutes*, will go into operation on the first day of January next, it was deemed advisable to give them, also, *Verbatim* : although they had not yet been published, the kindness of Benjamin F. Butler, Esq., one of the Revisers, enabled the Editor to lay them before his Readers ; for that, as well as for some valuable suggestions, with which he was favoured by that Gentleman in the progress of the Work, the Editor gladly avails himself of this opportunity, to express his grateful acknowledgments.

From the difficulty, which was experienced, in some cases, of adapting the notes of American Decisions to the order observed in the Text, it has been impracticable to arrange them, in every instance, with the same accuracy of Method, that might have been pursued in a work entirely original; so far, however, as this difficulty existed, it has been attempted to be obviated by a copious Index.

For the purpose of facilitating and preserving uniformity in references, the present Edition has been paged to correspond with one formerly published; and in addition to the usual Tables of Contents, and of Cases cited, there are also inserted for the convenience of Readers, a Table of the Abbreviations used in the following pages, and a Table of the Reports and Authorities consulted and cited, shewing the periods of time respectively embraced by them, and specifying the Courts whose Decisions they contain.

As this Work is merely a Compilation, the Editor can claim no other merit, or expect no other approbation, than such as belongs to a patient and careful investigation of the subject upon which he has written, and a faithful and complete collection of all the Decisions which he could find relating thereto. It is not presumed that perfection has been attained; but, considering the multiplicity and variety of cases, which have been consulted and cited, it is hoped, that there will not be found in this Edition, more errors than are usual in works of the kind.

Should this Compilation answer its intended purpose, of assisting the progress of the Student, and of saving the time, and abridging the labours of Practitioners in a useful and honourable Profession, the Editor will enjoy the satisfactory assurance, that his own time and labour have not been bestowed in vain.

*Albany July, 1829.*

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## TABLE OF ABBREVIATIONS.

A. D.	Anno Domini, In the year of our Lord
Addis. Rep.	Addison's Reports, ( <i>Pa.</i> )
Adm'r. Adm'rs.	Administrator, Administrators
Adm'x.	Administratrix
Aik. Rep.	Aiken's Reports, ( <i>Vt.</i> )
Amb.	Ambler's Reports.
And.	Anderson's Reports
Andr.	Andrew's Reports
Anon.	Anonymous!
Anst.	Anstruther's Reports.
Ante	Reference to a preceding page
Art.	Article
Atk.	Atkyn's Reports
Bac. Abr.	Bacon's Abridgement
Barnes	Barnes' Notes of Cases of Practice, in the Common Pleas
Barnew. & Ald. Rep.	Barnewall and Alderson's Reports
Barnew. & Cress. Rep.	Barnewall and Cresswell's Reports
Barnard.	Barnardiston's Reports
Bingh. Rep.	Bingham's Reports
Binn. Rep.	Binney's Reports, ( <i>Pa.</i> )
Bl., or Bl. Rep.	Sir William Blackstone's Reports
B. & P., or Bos. & Pull.	Bosanquet and Puller's Reports
B. R.	Banco Regis (in the Kings Bench)
Brayt. Rep.	Brayton's Reports, ( <i>Vt.</i> )
Brod. & Bingh. Rep.	Broderip and Bingham's Reports
Brown	Brown's Reports
Browne's Rep.	Browne's Reports, ( <i>Pa.</i> )
Brown's Parl. Cas.	Brown's Parliament Cases
Bull. N. P.	Buller's Nisi Prius
Burr. or Burr. Rep.	Burrow's Reports
C. Ch. Chap.	Chapter
Chan. Cas.	Cases in Chancery
Caines' Ca.	Caine's Cases in Error, ( <i>N. Y.</i> )
Caines' Rep.	Caine's Reports, ( <i>N. Y.</i> )
Call's Rep.	Call's Reports, ( <i>Va.</i> )
Cam. & Norw. Rep.	Cameron and Norwood's Reports, ( <i>Nor. Car.</i> )
Camp. or Camp. Ni. Pri. Rep.	Campbell's Reports, ( <i>Nisi Prius.</i> )
Car.	Carolus (Charles)
Carr. & P.'s Rep.	Carrington and Payne's Reports.

Carth.	Carthews' Reports
C. B.	Communi Banco, in the Common Bench, or Court of Common Pleas.
Ch.	Chapter, Chancellor, Chancery.
Charlt. Rep.	Charlton's Reports, ( <i>Ga.</i> )
Chip. Rep.	Chipman's Reports, ( <i>Vt.</i> )
Co. Litt.	Coke on Littleton ( <i>1st Institute</i> )
Comm.	Blackstone's Commentaries
Comp. Incumb.	Complete Incumbent ( <i>Watson's Clergyman's Law.</i> )
Conn.	Connecticut
Conn. Rep.	Connecticut Reports
Const. Rep.	Constitutional Reports, ( <i>So. Car.</i> )
Cooper's Cas. in Ch	Cooper's Cases in Chancery
Cow. Rep.	Cowen's Reports, ( <i>N. Y.</i> )
Cowp.	Cowper's Reports
Coxe's Rep.	Coxe's Reports, ( <i>N. J.</i> )
C. P.	Common Pleas
Cranch's Rep.	Cranch's Reports, ( <i>U. S.</i> )
Cro. Car.	Croke's Reports, in the time of Charles 1st.
Cro. Jac.	Croke's Reports, in the time of James 1st
Cruise's Dig.	Cruise's Digest
Dall. Rep.	Dallas' Reports, ( <i>Pa. &amp; U. S.</i> )
Day's Rep.	Day's Reports, ( <i>Conn.</i> )
Doug. or Doug. Rep	Douglas' Reports
Dy.	Dyer's Reports
E. or E. T.	Easter Term
East, or East's Rep.	East's Reports
Ed.	Edition
Esp. Ni. Pri.	Espinasse's <i>Nisi Prius</i> Digest.
Esp. or Esp. Rep.	Espinasse's Reports
Eq. Rep. (Desauss.)	Equity Reports, Desaussures, ( <i>So. Car.</i> )
Ex. Rel., or Ex. Relat.	Ex Relatione, Upon the relation of
Ex'r., Ex'rs.	Executor, Executors
Ex'x.	Executrix.
F. N. B.	Fitzherbert's <i>Natura Brevium</i> .
Gall. or Gallis. Rep.	Gallison's Reports, ( <i>U. S.</i> )
Greenl. Rep.	Greenleaf's Reports, ( <i>Me.</i> )
Halst. Rep.	Halstead's Reports, ( <i>N. J.</i> )
Hard. Rep.	Hardin's Reports, ( <i>Ky.</i> )
Hardr.	Hardres' Reports
Harr. & Gill's Rep.	Harris and Gills's Reports, ( <i>Md.</i> )
Harr. & Johns. Rep.	Harris and Johnson's Reports ( <i>Md.</i> )
Harr. & M'Hen. Rep.	Harris and M'Henry's Reports ( <i>Md.</i> )



Hayw. Rep.	Haywood's Reports, ( <i>N. Car.</i> )
Hawk's Rep.	Hawk's Reports, ( <i>N. Car.</i> )
H. Bl.	Henry Blackstone's Reports
Hen. & Munf. Rep.	Hening and Munford's Reports ( <i>Va.</i> )
Hil.	Hilary Term
Hist.	History
Holt's Rep.	Holt's Reports
Hopk. Rep.	Hopkins' Chancery Reports ( <i>N. Y.</i> )
Hutt.	Hutton's Reports
2 Inst.	Second Institute (Coke's Magna Charta)
Jac. & Walk. Rep.	Jacob and Walker's Reports
Jac.	Jacobus (James)
Johns. Cas.	Johnson's Cases, ( <i>N. Y.</i> )
Johnz. Rep.	Johnson's Reports, ( <i>N. Y.</i> )
Johns. Ch. Rep.	Johnson's Chancery Reports, ( <i>N. Y.</i> )
Jones	Jones' Reports
Keb.	Kebble's Reports
Kirb. Rep.	Kirby's Reports, ( <i>Conn.</i> )
Ky.	Kentucky.
Ld. Raym.	Lord Raymond's Reports
Lev.	Levinz's Reports
Litt.	Littleton
Litt. Rep.	Littell's Reports, ( <i>Ky.</i> )
Litt. Sel. Cas.	Littell's Selected Cases ( <i>Ky.</i> )
La., or Loua.	Louisiana.
Lutw.	Lutwyche's Reports
Marsh. Rep. ( <i>Eng. C. P.</i> )	Marshall's Reports of the English Common Pleas
Marsh. Rep. ( <i>Ky.</i> )	Marshall's Reports, Kentucky
Mart. Rep.	Martin's Reports, ( <i>Loua.</i> )
Mart. Rep. ( <i>N. S.</i> )	Martin's Reports, New Series, ( <i>Loua.</i> )
Mas. or Mason's Rep.	Mason's Reports ( <i>U. S.</i> )
Mass.	Massachusetts
Mass. Rep.	Massachusetts Reports
M'Cord's Ch. Rep.	M'Cord's Chancery Reports, ( <i>So. Car.</i> )
Maule & S. Rep.	Maule and Selwyn's Reports
Md.	Maryland
Meriv. Rep.	Merivale's Reports
Mod.	Modern Reports
Monr. Rep.	Monroe's Reports, ( <i>Ky.</i> )
Moore's Rep.	Moore's Reports
M. Mic., or Mich.	Michaelmas Term
Munf. Rep.	Munford's Reports, ( <i>Va.</i> )
Murph. Rep.	Murphey's Reports ( <i>N. Car.</i> )
N.	Note

Nels. or Nels. Abr.	Nelson's Abridgment
New Hamp. Rep.	New-Hampshire Reports
New Rep.	New Reports, (4th & 5th of Bosanquet and Puller)
N. Car. or Nor. Car.	North Carolina
N. Car. Law Rep.	North Carolina Law Repository
N. J.	New-Jersey
Nott & M'C's. Rep.	Nott and M'Cord's Reports, (So. Car.)
N. S.	New Series
N. Y.	New-York
Ohio Rep.	Ohio Reports, (Hammond's)
P.	Paschalis, Easter Term
Pa.	Pennsylvania
Paige's Rep.	Paige's Chancery Reports, (N. Y.)
Paine's Rep.	Paine's Reports, (U. S.)
Peake's N. P.	Peake's Nisi Prius Reports
Penn. Rep.	Pennington's Reports, (N. J.)
Peter's Rep.	Peter's Reports, (U. S.)
Picker. Rep.	Pickering's Reports, (Mass.)
Plowd.	Plowden's Reports
Post.	Reference to a subsequent page
P. W.	Peere William's Reports
Rand. Rep.	Randolph's Reports, (Va.)
Raym.	Sir Thomas Raymond's Reports
Rep.	Reports, Repository
Rep. Constit. Ct. So Car.	Reports of the Constitutional Court of South Carolina
R. L. or Rev. L.	Revised Laws
Roberts on Fraud. Conv.	Roberts on Fraudulent Conveyances
Root's Rep.	Root's Reports, (Conn.)
Run. Eject.	Runninton on Ejectment
S., or Sect.	Section
Salk.	Salke's Reports
Saund.	Saunders's Reports
Sch. & Lefr. Rep.	Schoales & Lefroy's Reports
Selw. N. P.	Selwyn's Nisi Prius
Show.	Shower's Reports
Serg. & R's. Rep.	Sergeant and Rawle's Reports (Pa.)
Sid.	Siderfin's Reports
Sess.	Session
Sir T. Jones.	Sir Thomas Jones' Reports
So. Car.	South Carolina
South. Rep.	Southard's Reports (N. Y.)
Starkie's Rep.	Starkie's Reports, Nisi Prius
St.	Statute
Stra. or Stra. Rep.	Strange's Reports

Sty. or Styles.	Styles' Reports
T.	Term
T. or Trin.	Trinity Term
T. R.	Term Reports ( <i>Darnford and East's Reports.</i> )
Taunt., or Taunt. Rep.	Taunton's Reports
Tayl. Rep.	Taylor's Reports, ( <i>N. Car.</i> )
Tenn. Rep.	Tennessee Reports
Tyl. Rep.	Tyler's Reports, ( <i>Vt.</i> )
U S.	United States
Ut Semb.	Ut Semble, <i>as it seems</i>
Va.	Virginia
Vent. or Ventris.	Ventris' Reports
Vern.	Vernon's Reports
Ves. or Ves. Rep. (Junr. or Sen.)	Vesey's Reports, Junior, or Senior
Ves. & Beame.	Vesey and Beame's Reports
Vin. Abr.	Viner's Abridgment
Virg. Cas.	Virginia Cases
Virg. Rep.	Virginia Reports
Wall. Rep.	Wallace's Reports, ( <i>U. S.</i> )
Wash. Rep.	Washington's Reports, ( <i>Va.</i> )
Wend. Rep.	Wendell's Reports, ( <i>N. Y.</i> )
Wheat. Rep.	Wheaton's Reports, ( <i>U. S.</i> )
Willes.	Willes' Reports
Wils. or Wils. Rep	Wilson's Reports
Yeate's Rep.	Yeate's Reports, ( <i>Pa.</i> )

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Gallison's	"	"	Circuit Court (1st. Circuit) from May
			1812, to November 1815; 2 vols.
Mason's	"	"	Circuit Court (1st. Circuit) from October
			1815, to October 1827; 4 vols.
Paine's	"	"	Circuit Court, (2d Circuit) from April
			1810, to April 1824; 1 vol.
Wallace's	"	"	Circuit Court (3d Circuit) May Session,
			1801; 1 vol.

There are also several of the Decisions of the Supreme and Circuit Courts of the United States, contained in Dallas' Reports. Vide *Pennsylvania*.

### *Connecticut.*

Root's Reports, of the Superior Court and Court of Errors, from			
			March 1764, to July 1797; 2 vols.
Kirby's	"	"	Superior Court from February 1786, to
			May 1788; 1 vol.
Day's	"	"	Court of Errors, from June 1802, to November
			1813; 5 vols.
Connecticut	"	"	from June 1814, to November
			1827; 6 vols.

### *Georgia.*

Charlton's Reports of the Superior Courts of the Eastern District, from January 1805, to October 1810; 1 vol.

### *Kentucky.*

Littel's Selected Cases in the Court of Appeals, from October			
			1795 to October 1821; 1 vol.
Bibb's Reports of the Court of Appeals, from October 1808, to			
			May 1817; 4 vols.
Marshall's	"	"	from 1817, to October
			1821; 3 vols.

Littel's Reports of the Court of Appeals, from April 1822, to  
June 1824; 5 vols.  
Monroe's " " " " " from October 1824,  
to December 1824; 1 vol.

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*Louisiana.*

Martin's Reports of the Supreme Court, from 1809, to February  
1823; (1st series,) 12 vols.  
" " " " " Court from March 1823, to July  
1826; (2d series,) 4 vols.

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*Maine.*

Greenleaf's Reports of the Supreme Court, from August 1820, to  
August 1825; 3 vols.

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*Maryland.*

Harris and M'Henry's Reports of several Courts, from April 1689,  
to December 1799; 4 vols.  
Harris and Johnson's Reports of the General Court, and Court of  
Appeals, from April, 1800 to June 1825; 6 vols.  
Harris and Gill's Reports of the Court of Appeals, from June  
Term 1826, to June Term 1827; 1 vol.

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*Massachusetts.*

Massachusetts Reports of the Supreme Judicial Court, from Sep-  
tember 1804, to March 1822; 17 vols.  
Pickering's Reports of the Supreme Judicial Court, from Septem-  
ber 1822, to March 1828; 5 vols.

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*New Hampshire.*

New Hampshire Reports of the Superior Court from September  
1816, to May 1823; 2 vols.

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*New-Jersey.*

Coxe's Reports of the Supreme Court, from April 1790, to No-  
vember 1795; 1 vol.  
Pennington's " " " " " from May 1806, to Feb-  
ruary 1812; 2 vols.  
Southard's " " " " " from February 1818, to  
May 1820; 2 vols.  
Halstead's " " " " " From November 1821, to  
February 1828; 4 vols.

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*New-York.*

Johnson's Cases in the Supreme Court and Court of Errors, from  
January 1799, to March 1803; 3 vols.  
Caines' Cases in the Court of Errors, from 1801, to 1805; 2 vols.

Caines' Reports of the Supreme Court from May 1803, to November 1805; 3 vols.  
 Johnson's Reports of the Supreme Court, and Court of Errors, from February 1806, to May 1823; 20 vols.  
 Johnson's Reports of the Court of Chancery, from March 1814, to May 1823; 7 vols.  
 Cowen's Reports of the Supreme Court and Court of Errors, from May 1823, to February 1828; 8 vols.  
 Hopkins' Reports of the Court of Chancery from September 1823, to January 1826; 1 vol.  
 Paige's Reports of the Court of Chancery, commencing April 1828; the 1st volume not completed.  
 Wendell's Reports of the Supreme Court, and Court of Errors, from May 1828, to February 1829; 1 vol. and part of 2d.

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*North Carolina.*

Haywood's Reports of the Superior Courts, from October 1789, to May 1806; 2 vols.  
 North Carolina Law Repository, containing Reports of Several Courts from June 1798, to January 1818; 3 vols.  
 Taylor's Reports of the Superior Courts of Law and Equity, from March T. 1799, to July T. 1802; 1 vol.  
 Cameron and Norwood's Reports of the Court of Conference, from June 1800, to June 1804; 1 vol.  
 Murphey's Reports of the Supreme Court, 1st vol. From December 1804, to July 1810; 3d vol. during the year 1819; 2 vols.  
 Hawk's Reports of the Supreme Court, from June Term 1820, to December Term 1823; 2 vols.

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*Ohio.*

Hammond's Reports of several Courts, from August 1821, to December 1824; 2 vols.\*

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*Pennsylvania.*

Dallas' Reports of several Courts, from September 1754, to April 1806; 4 vols.  
 Addison's Reports of the Court of Errors, from September 1791, to March 1797; 1 vol.  
 Yeates' Reports of the Supreme Court, from April 1791, to September 1808; 4 vols.  
 Binney's Reports of the Supreme Court, from December 1799, to June 1814; 6 vols.  
 Browne's Reports of the Court of Common Pleas of the 1st Circuit, from May 1806, to January 1813; 2 vols.  
 Sergeant and Rawle's Reports of the Supreme Court, from June 1814, to October 1827; 16 vols.

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\*Cited as "Ohio Reports."



*South Carolina.*

Bay's Reports of the Superior Courts, from November 1783, to November 1804; 2 vols.  
 Desaussure's Reports of the Court of Chancery, from September 1784, to December 1816; 4 vols.\*  
 Treadway's Reports of the Constitutional Court, from January 1812, to November 1816; 2 vols.†  
 Mill's Report's of the Constitutional Court, from May 1817, to May 1818; 2 vols.‡  
 Nott and M'Cord's Reports of the Constitutional Court, from November 1817, to November 1820; 2 vols.  
 M'Cord's Reports of the Court of Appeals, from January 1825, to May 1826; 1 vol.§

*Tennessee.*

Overton's Reports of several Courts, from November 1791, to May 1815; 2 vol.¶

*Vermont.*

Chipman's Reports of the Supreme Court, from December 1789, to February 1824; 1 vol.  
 Tyler's Reports of the Supreme Court, from January 1800, to May 1803; 2 vols.  
 Brayton's Reports of the Supreme Court, from October 1815, to October 1819; 1 vol.  
 Aiken's Reports of the Supreme Court, from October 1825, to October 1826; 1 vol.

*Virginia.*

Cases in the General Court, from November 1783, to June 1826; 2 vols.¶  
 Washington's Reports of the Court of Appeals, from the Fall Term 1790, to the Fall Term 1796; 2 vols.  
 Call's Reports of the Court of Appeals, from April 1797, to November 1803; 3 vols.  
 Henning and Munford's Reports of the Court of Appeals, &c., from September 1806, to February 1810; 4 vols.  
 Munford's Reports of the Court of Appeals, from March 1810, to April 1820; 6 vols.  
 Gilmer's Reports of the Court of Appeals, from April 1820, to June 1821; 1 vol.\*\*

\* Cited by the name of "Equity Reports."

† Cited by the name of "Constitutional Reports."

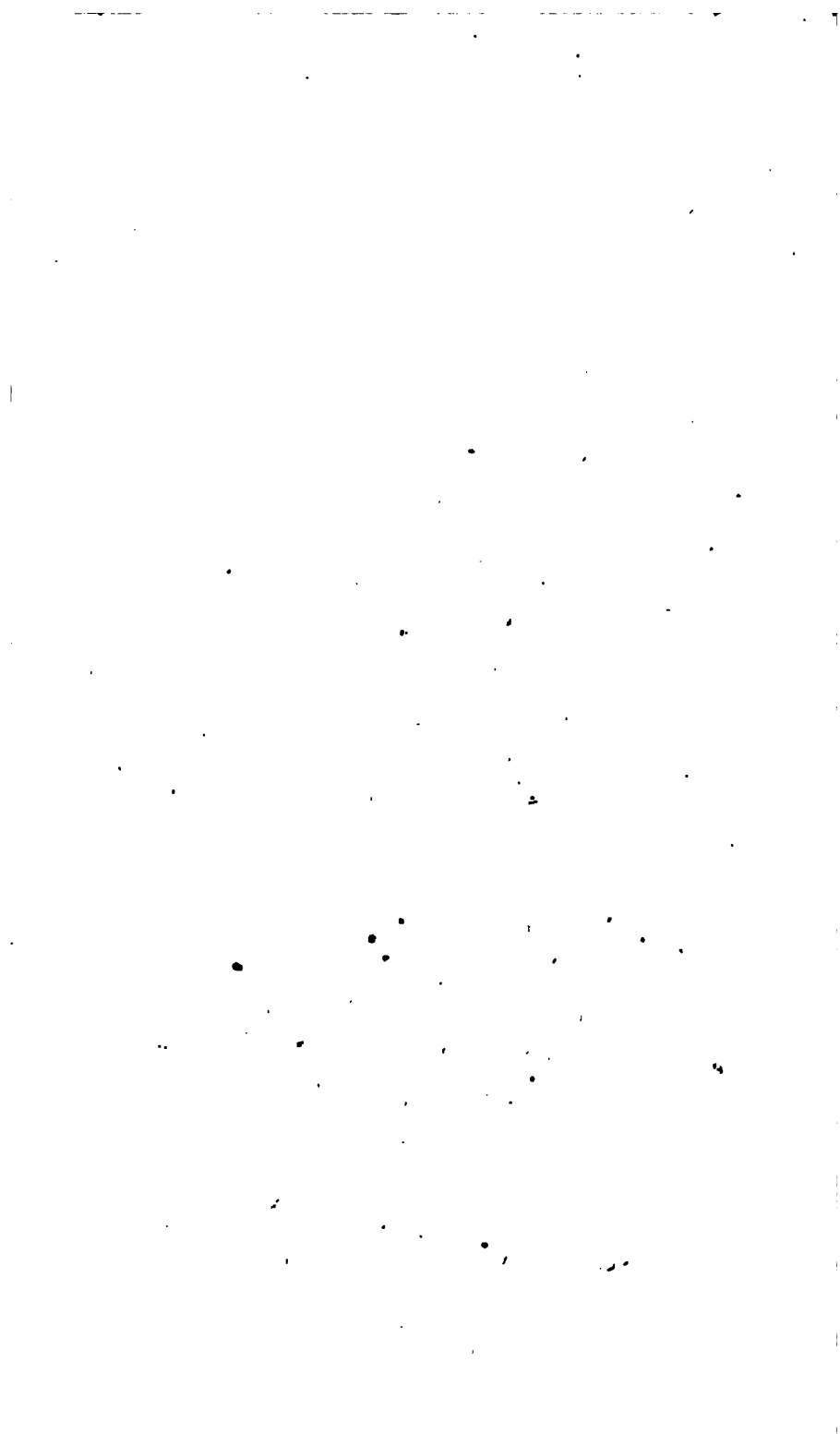
‡ Cited as "Reports of the Constitutional Court of South Carolina."

§ Cited as "M'Cord's Chancery Reports."

¶ Cited as "Tennessee Reports."

¶ Cited as "Virginia Cases," The first volume by Brockenbrough and Holmes; and the second volume by Brockenbrough.

\*\* Cited as "Virginia Reports."



# ERRATA.

Page 20, n. [2.]	line 15, for "tortions" read tortious.
" 20, " [2.]	" 63, for "Operation" read Occupation.
" 27, " [2.]	" 65, for "bequesth" read bequeathed.
" 59, " [1.]	" 14, after the word "non-residents" dele the word "made."
" 59, " [1.]	" 25, after the word "state" dele the word "who."
" 60, " [1.]	" 21, for " <i>Lawyer</i> " read <i>Sauryer</i> .
" 60, " [1.]	" 23, for " <i>Gooright</i> " read <i>Goodright</i> .
" 60, " [1.]	" 73, for " <i>Roe</i> " read <i>Doe</i> .
" 70, " [1.]	" 61, for "there" read their.
" 71, " [1.]	" 5, for " <i>Frankin</i> " read <i>Franklin</i> .
" 88, " [1.]	" 3, for " <i>Ballard</i> " read <i>Bullard</i> .
" 94, " [2.]	" 28, for " <i>Mass</i> " read <i>Mason's</i> .
" 111, " [1.]	" 5, for "trespass" read trespasser.
" 147, " [3.]	" 33, after "B." add, filed his declaration against A. and B.,
" 163, " [1.]	" 11, for " <i>Whetcraft</i> " read <i>Whetcroft</i> .
" 163, " [1.]	" 23, for "brough" read brought.
" 188, " [2.]	" 5, for " <i>Pitman</i> " read <i>Pittam</i> .
" 189, " [2.]	" 10, for "exactor" read Executor.
" 190, " [2.]	" 345, for " <i>Roffe</i> " read <i>Roffey</i> .
" 191, " [1.]	" 31, for " <i>Johns. Rep.</i> " read <i>Johns. Ch. Rep.</i>
" 191, " [1.]	" 470, for " <i>Starke</i> " read <i>Starkie's</i> .
" 360, line 14,	for "promise" read <i>Proviso</i> .
" 372, " 5,	after the parenthesis, insert <i>Fishwick's Admr. vs. Sewell</i> .
" 381, " 6,	for "delivered" read <i>delivering</i> .
" 396, " 3,	for " <i>Breemen</i> " read <i>Beemen</i> .
" 405, " 45,	for " <i>Caimes</i> " read <i>Cairns</i> .
" 420, " 18,	for " <i>Duncan</i> " read <i>Duncan's Lessee</i> .
" 433, " 27,	for "he" read the.
" 484, " 34,	for "bee" read been.
" 500, last line but one,	for " <i>HolP</i> " read <i>Hall</i> .

A

**TREATISE**

OF THE

**STATUTE OF LIMITATIONS.**

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*An Act for Limitation of Actions, and for avoiding of suits in*  
(21 Jac. I. c. 16.)

FOR quieting of men's estates, and avoiding of suits, enacted, by the king's most excellent majesty, the lords spiritual and temporal, and commons, in this present parliament assembled, that all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter sued or brought, of, or for any manors, lands, tenement hereditaments, whereunto any person or persons now have any title, or cause to have or pursue any such writ, be sued or taken within twenty years next after the end of present session of parliament: And after the said twenty years expired, no person or persons, or any of their heirs, shall or maintain any such writ, of or for any of the said manors, lands, tenements, or hereditaments; (2) and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title cause hereafter happening, shall be sued or taken within twenty years next after the title and cause of action first descended, fallen, and at no time after the said twenty years; (3) and no person or persons that now hath any right or title of into any manors, lands, tenements or hereditaments now

*Stat. 21 Jac. I. c. 16.*

from him, or them, shall thereinto enter, but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued ; (4) and that no person or persons shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same ; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made ; any former law or statute to the contrary notwithstanding.

II. Provided nevertheless, That if any person or persons that is or shall be entitled to such writ or writes, or that hath or shall have such right or title of entry, be, or shall be, at the time of the said right or title first descended, accrued, come or fallen within the age of one and twenty years, *feme covert, non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry as he might have done before this act : (2) so as such person and persons, or his or their heir and [ \*3 ] heirs, shall within ten years next after his and \*their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no time after the said ten years.

III. And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without speciality ; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which

*Stat. 21 Jac. I. c. 16.*

shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say;) (2) the said actions upon the case, (other than for slander,) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clauum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said action upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after.

\*IV. And nevertheless, be it enacted, That if in [4\*] any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

V. And be it further enacted, That in all actions of trespass *quare clauum fregit*, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendant or defendants shall

*Stat. 21 Jac. I. c. 16.*

be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; (2) and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suits concerning the same.

[\*5]       \*VI. And be it further enacted by the authority aforesaid, That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any the courts of record at Westminster, or in any court whatsoever, that hath power to hold plea of the same, after the end of this present session of parliament, if the jury upon the trial of the issue in such action, or the jury that shall enquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, custom, or usage to the contrary in anywise notwithstanding.

VII. Provided nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of accounts, actions of debt, actions of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be, or shall be; at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.

## LIMITATION OF ACTIONS.

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### CHAP. I.

#### *Of Writs of Formedon.*

THE first section of this statute concerns writs of formedon and rights of entry ; the second section saves the right of action or entry, to those, who, at the time the right accrues, are under any of the disabilities therein mentioned.

Formedon(a) is a real action, which lies for the issue in tail after the death of his ancestors, or for him in remainder or reversion after the estate-tail determined, and is called formedon, because the writ comprehends the form of the gift.

The proceedings in this action, as in all other real actions, being dilatory and expensive, it is now seldom brought ; but it is a proper remedy in many cases, and still in use : writs of formedon may be considered under the following heads, viz. the formedon in descender, the formedon in remainder, and the formedon in reverter.

Formedon in the descender is an action ancestral droiturel, which lies for the issue in tail, upon a violation of that right which descends to him from his ancestor, \*according to the form of the gift, and is in nature of a writ of [\*8] right, being the highest writ that an issue in tail can have.

This writ lay not at common law, but was given by Westm.

(a) Bac. Abr. tit. Formedon, (A.) F. N. B. 211. (L.)



2 cap. 1. the form of which is set forth in the statute ; or at common law all estates-tail were fee-simple conditional ; and the donee, by having issue, might have aliened the estate, or forfeited it, in which cases the issue had no remedy ; but when by this statute, called the statute *de donis conditionalibus*, the donee was deprived of this power ; it was also necessary that the issue should have a remedy against the alienation or discontinuance of his ancestor, and therefore the formedon in descender was given.

Formedon(a) in remainder lies where a gift is made in tail or for life, remainder in tail or in fee, and the tenant in tail or for life aliens or is disseised, and dieth without issue, he in remainder, or his representative, may bring their formedon in remainder.

This writ, as it lies for him in remainder after an estate-tail, is grounded upon the equity of the statute *de donis* ; for a formedon in remainder did not lie upon an estate-tail at common law, because it was a fee-simple conditional, whereupon no remainder could be limited, because of the danger of a perpetuity, which was always against the policy of our law.

[ \*9 ] . \*Formedon(b) in reverter lies, where the donee in tail, or his issue, die without issue, and a stranger abates, or they who were seised by force of the entail discontinue the same ; in either of these cases, the donor or his heirs may have a formedon in reverter.

This writ lay at common law ; for though at common law the estate-tail was a fee-simple conditional, so that by having issue, the donee, by alienation, &c. might have barred the possibility of the donor's right of reverter, yet the having of children was in the nature of a condition precedent ; and there-

(a) Bac. Abr. tit. Formedon, (A.) F. N. B. 217, 218. (A.)

(b) Bac. Abr. tit. Formedon, (A.) F. N. B. 219.

fore if the donee never had a child, the donor might bring his formedon in reverter, and recover against any alienation or disposition of the donee.

At common law there does not appear to have been any stated or fixed time for the bringing of actions;[1] for though it be said by Bracton,(a) that "*omnes actiones in mundo infra certa tempora limitationem habent*," yet Coke says,(b) that the limitation of actions was by force of divers acts of parliament, and that the general position of Bracton admits of several exceptions.

But formedons(c) were not within any of the ancient limitations; the seisin of the donee was never traversable till the stat. 32 H. VIII. c. 2. wherein it is enacted, "that all formedons in reverter, formedons in remainder, and *scire facias*, upon fines of any manors, lands, tenements, or other hereditaments, shall be sued and taken within fifty years next after the title and cause of action fallen, and at no time after the said fifty years passed." Lord \*Coke observes,(d) that this act [\*10] extendeth not to a formedon in descender; and Mr. Hargrave, in his note 148. on this observation, says, that the statute mentions formedons in remainder and reverter, and limits them to fifty years; but omits formedon in descender. Nor is the latter deemed to be comprehended within the clause of the statute relative to writs of right: for a formedon is not, in the strict sense, a writ of right, though it certainly is in the nature of one, the mere right being equally triable in both. Accordingly, in the case cited by Lord Coke from Dyer, three

(a) Lib. 2. fol. 228.

(b) Co. Litt. 115.

(c) 2 Dy. 278.

(d) Co. Litt. 115.

[1] "By the common law, there was no stated or fixed time, as to the bringing of actions. Limitations are created by, and derive their authority from, statute. (4 Bac. Abr. 461.)" *The People vs. Gilbert*, 18 Johns. Rep. 228. (Per WOODWORTH, J. delivering the opinion of the court;) and vide *Wilcox, qui tam. vs. Fitch*, 20 Johns. Rep. 475. Same point, *Wall ads. Robson*, 2 Nott & McC. Rep. 499. Per BAY J. delivering the opinion of the court.)

judges held that a formedon in descender was not within the statute ; the othe judges doubted : and a case to the same effect is referred to from Bendloe's Reports, 194. But as the 21 Jac. I. c. 16. requires formedons of every kind to be brought within twenty years after the descent of the title, this defect of the former statute is now of no consequence.

The principle which ruled the construction of the statute of Henry, as applied to the bringing of writs of formedon, is not affected by the statute of James ; but since the passing of the latter statute, there is not to be found in the books, an instance wherein the limitation of twenty years has been objected to a writ of formedon.

In consequence(a) of the words "first descended or fallen," if a person entitled to an estate-tail, with remainder over, neglects to bring his writ of formedon within twenty years after his right accrues, he and his issue will be for ever barred.[1]

(a) 3 Cruise's Dig. 541.

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[1] If the time limited has once run against any tenant in tail, it is a good bar not only against him, but also against all persons claiming in the descent *per formam doni* through him. *Inman vs. Barnes*, 2 Gallis. Rep. 319.

When the statute of limitations once begins to run against an heir in tail, no subsequent event can interrupt its progress; and when it has run twenty years, no *Formedon* can afterwards be maintained. *Dow vs. Warren*, 6 Mass. Rep. 328.

Tenant in tail dies leaving issue in tail a grand-daughter a feme covert, the grand-daughter dies covert leaving issue in tail two sons infants, the elder attains the age of twenty-one years, and dies; the younger attains his age of twenty-one years, and fourteen years after issues out a writ of formedon in the descender.—Held, that he is barred by the statute of 21 Jac. I. c. 16. The court said, "The daughter and infant heir of a *feme covert* has ten years after the disability ceases, not from the death of the mother." And CHAMBER J. said, "The ten years do not run at all "while there is a continuance of disabilities, but they run without intermission from the time that the disabilities first cease." *Cotterell vs. Dutton*, 4 Taunt. Rep. 830.

The twenty years within which a *Formedon* in the descender

But the person in remainder will be allowed twenty years, from the determination of the preceding estate-tail,[2] to bring his writ of formedon, although \*such preceding [ \*11 ] estate-tail should continue for centuries ; but although he be barred of his formedon, he is not thereby hindered to pursue his right of entry which afterwards accrues to him.[1]

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ought to be commenced under the statute of 21 Jac. 1 c. 16., begins to run when the title descends to the first heir in tail, unless he lie under a disability. *Tolson vs. Kaye*, 3 Brod. and Bing. Rep. 217. *Wells vs. Newbolt*, Cam. & Norw. Rep. 406, 407 ; & vide *Cheseldine's Lessee vs. Brewer*, 4 Har. & McHen. Rep. 487. *Purnell vs. Reynolds*, 4 Har. & McHen. Rep. 489.

[2] Possession doth not begin to run against the remainder-man until after the death of the particular tenant. *Chandler vs. Phillips*, 1 Root's Rep. 546.

[1] *Martindale's Lessee vs. Troop, & ux.* 3 Harr. & McHen. Rep. 245. This was an action of *Ejectment*, brought to September Term, 1782, for a tract of land called *Redford*, lying in *Caroline* county.

By the special verdict found at September Term, 1790, it appears that *Richard Webb* being seised in fee of a tract of land called *Redford*, on the 10th September, 1677, by his last will and testament devised the same unto his two sons, *Richard Webb* and *John Webb*, " to be equally divided in moieties between them, provided, that if either his said sons should die without heirs of his body, then the survivor should inherit all his estate, and that they should enjoy it as aforesaid, with their heirs for ever, or to either of their heirs. But if both of the said sons should die without issue, then the said land should be enjoyed by his daughter, *Mary Webb*, and her heirs forever.

On the first day of December, in the same year, the said *Richard Webb* died ; after whose decease the said *Richard* and *John*, by virtue of a deed of partition bearing date the 25th day of July, 1710, became severally seised of their respective moieties ; *Richard* of the westernmost moiety and *John* of the easternmost. *John* being so seised of the easternmost moiety, on the 10th of May, 1715, died, leaving *John Webb*, the second, his eldest son and heir at law. *John*, the second, on the 1st of April, 1749, died, leaving *William Webb*, his eldest son and heir at law. *William Webb*, on the 1st day of January, 1756, died, leaving *Mary Webb*, his only child and heir at law. *Mary*, on 1st of January, 1772, married *Henry Martindale*, and afterwards, on the 5th of July, 1775, died, leaving *Lydia* and *Elizabeth*, her only children and co-heirs, and who are the lessors of the plaintiff.

In (a) ejectment on the demise of R. Gwilym, the jury, on not guilty pleaded, found, that T. Andrews was seised in fee of

(a) Lutw. 770

*Richard Webb*, the son of *Richard*, the devisor, being so seised of the westernmost moiety of the tract of land aforesaid, and which westernmost moiety was the premises in question, by deed of bargain and sale, bearing date the 25th of *July*, 1710, bargained and sold the said westernmost moiety unto a certain *John Wilson*; and on the 10th of *May*, 1719, died without issue of his body, leaving the aforesaid *John Webb*, the second, his nephew, and heir, of the age of fourteen years. *John Wilson* bargained and sold the same to a certain *John Knowles*, to whom a certain *Mary Knowles*, was an only child and heiress; and who devised the same to her daughters, *Sarah Elizabeth* and *Margaret*, who are the present defendants. The said westernmost moiety has been in the sole, exclusive and adverse seisin of the defendants, and those through whom they claim, from the 25th of *July*, 1710, until the entry of the lessors of the plaintiff, on the 1st of *July*, 1782, without any claim or interruption by the said lessors of the plaintiff, or those under whom they claim.

The Court, (all the Judges present,) were of opinion the statute of limitations did not run against the issue in tail, and gave judgment on the special verdict of the plaintiff.

But at the *June Term*, 1796, the Court of Appeals reversed the judgment of the general court.

In *Wells vs. Prince*, (9 *Mass. Rep.* 509.) the Court said; "The defence in this case is, that the devisee for life having never entered, her refusal to accept the devise is to be presumed: and then the right of entry of the petitioner or remainderman having accrued immediately, he was bound to enter within twenty years; and having failed so to enter, his right of entry is gone, without which he cannot maintain this process. That those in remainder might have entered immediately on the refusal of the devisee for life to accept the devise is true. But one may have different rights of entry: and although the devisee for life refuses to accept the estate devised, and the remainderman thereby acquires an immediate right of entry, yet he is not obliged to avail himself of his right so accruing, but he may enter after his second right accrues by the death of the tenant for life." & vide *Wallingford vs. Hearl*, 15 *Mass. Rep.* 472.

In the case of *Stevens & ux. vs. Winship & ux.* (1 *Pick. Rep.* 327.) *WILDE, J.* delivering the opinion of the Court, said; "As to the objection of forfeiture, it is sufficient to remark that the demandants do not claim a right of entry arising from forfeit

the tenements in question ; that he had issue Mary, after married to J. Gwilym, who had issue Thomas, and he had issue Thomas, who had issue the lessor ; that T. Andrews conveyed the premises to the use of himself and Eleanor his wife for their lives, remainder to Mary Andrews his daughter, and the heirs of her body by the said J. Gwilym, with other remainders over. T. Andrews and his wife died, and the said J. Gwilym and his wife entered ; that they both died, and T. Gwilym their son entered ; -that the tenements are parcel of the manor of W., which is ancient demesne ; that by the custom there, fines founded on writs of right close are levied in the court of the manor ; that 29th May, 1646, the said Thomas levied a fine *sur concessit* to three for their lives, reserving a yearly rent, but not the ancient rent ; which fine is said to be levied in *placito*

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" ture. If a forfeiture were incurred, the demandants were not bound to enter ; *Doe d. Cook v. Danvers*, 7 East, 321 ; *Wells v. Prince*, 9 Mass. Rep. 508 ; and if the right to enter for that cause is now barred by the statute of limitations, this does not affect the right of entry arising afterwards on the death of tenant for life. If there be two rights of entry, one may be lost without impairing the other. *Wells vs. Prince ; Hunt vs. Burn*, 2 Salk. 422."

A deed of a tenant in tail, pursuant to the statute of 1791, c. 60. [Massachusetts, enabling tenants in tail "for a good or valuable consideration, bona fide," to alien the land entailed,] must be made for a good or valuable consideration, in point of fact ; it is not sufficient that it merely purports to be so made, if the fact be otherwise. *Soule vs. Soule & Al.* 5 Mass. Rep. 61.

Devise of land to A. for life, remainder to demandant in fee. The tenants enter under an invalid purchase, and hold the same for more than six years, making improvements on the lands. A. dies, and the demandant thereupon brings his writ of formedon. *Held*, " that the demandant is entitled to recover, subject however to the provisions of the limitation and settlement act, to the benefit of which the tenants are clearly entitled. It is no objection to their claim, that they entered during the continuance of the estate of the tenant for life, and that the demandant's title did not accrue until within six years from the commencement of the action. The shifting of the legal title does not affect the tenants' possession, and as they have had actual possession for more than six years, they are entitled to the benefit of the statute." *Heath vs. Wells & Al.* 5 Picker. Rep. 140. 145.

*conventionis* ; that Thomas Gwilym and his wife, 2d June, 24 Car. I. levied a fine *sur consuance de droit comme ceo*, &c. with warranty to T. Marret and his heirs, to the use of the said T. Gwilym in fee ; that T. Gwilym the Father, 1st Nov. 24 Car. I. by indenture enrolled before a justice of the peace, &c. conveyed the premises to T. Payne, the defendant's ancestor, in fee ; that T. Gwilym died 20th June, 1663, the said T.

Gwilym, junior, then being of the age of twenty-one [\*12] years, who died, having issue the \*lessor ; that the survivor of the said three lessees died 17th, Sept. 1693 ; that thereupon the defendant entered, and the lessor being of the age of twenty-one years, entered upon them. The jury then found the lease, entry, and ouster ; and if, &c. The court were of opinion, that nothing appeared on the record whereby the entry of the lessor was barred, and therefore judgment was given for him.

But a writ of error was brought, and the judgment affirmed by the opinion of all the judges of the King's Bench, who delivered their opinions *seriatim*, and amongst other points, resolved unanimously—

That the plaintiff's lessor is not barred by the statute of 21 Jac. I. of limitations, although twenty years were passed after the right of action (*scil. formedon*) accrued. For although he was barred of that action after twenty years past, yet he had title of entry only after the discontinuance for three lives was determined ; and he shall have twenty years for entry after his title of entry accrued to him, which in this case was by the determination of the lease for three lives, and that was within twenty years before the action brought.

But(a) to reverse this judgment, and the affirmance of it, a writ of error was brought in parliament ; and on behalf of the plaintiffs in error it was said, that there were three questions

(a) Brown's Parl. Cas. 67.

in the case ; first, whether the first fine levied by the tenant in tail in ancient demesne, worked a discontinuance ? for if not, then the plaintiff's title of entry commencing above twenty years before, was barred by the statute of limitations.

\*Secondly, whether the discontinuance, if any, [\*13] determined with the estate for three lives, granted by that fine, or still continued, to bar the entry of the issue in tail ; either by means of that fine, or the second fine with warranty, or any other conveyance in the cause ?

Thirdly, whether, as the plaintiff had lapsed the twenty years given him by the statute to bring his formedon, and so was barred of his right of action, he was not also, for the same reason, barred of his right of entry ?

As to the first question, it was argued, that a court of ancient demesne to take a fine, being disabled by stat. 18 Ed. I. which enacts, "that no fine shall be levied without writ original, and this before the justice of the common pleas, or in eyre, and not elsewhere ;" and that the statute being formed in the negative, would prevail against any custom pretended, or even found to support such fine ; and, being general, would destroy the power of that court to take a fine to any effect whatsoever. But if such a court could take fines by virtue of a custom, yet, that this particular fine was not levied pursuant to the custom ; because it did not appear to be founded on a writ of right close ; which writ is in the nature of a commission authorizing the lord to take the fine ; if therefore the court had no jurisdiction to take a fine, or if the custom of a manor was not pursued, the fine was consequently void, and could never work a discontinuance. That the reason given by Lord Coke, 1 Inst. 383. why any fine works a discontinuance, is, that it is a feoffment of record ; but this fine could not be said to be in the nature of such feoffment, because levied in a court which was not of record ; and not being within the reason, ought not to be within the rule, \*of other fines of record, which do discontinue [\*14]



estates; and if, for these reasons, there could be no discontinuance, the consequence was, that the right of entry of the issue in tail commenced immediately upon the death of the tenant in tail, which happened in 1663, above twenty years before the issue entered, and therefore this entry was barred by the statute of limitations.

As to the second question, it was insisted, that the discontinuance, if any, did not determine with the estate for three lives, but still continued to bar the entry of the issue in tail, by the common law; because a fee passed by the first fine to the conusee, by force of the words *conusance de droit*, which are ever intended of the fee; the words right and fee being synonymous terms, as appears from 1 Inst. 345-6; and right is the proper term of art to carry the fee in the acknowledgment of a fine, and so constantly used; and if the fee passes by that conveyance, or act, which originally causes the discontinuance, that discontinuance must be for the whole fee; and on this account differs from all the cases in Lit. sec. 621. 1, 2. where the first grant passed only an estate for life, and therefore originally made a discontinuance for that life only. But if, in this case, the first fine alone would not work a discontinuance in fee, yet the second fine and warranty would, in order that the warranty might be preserved; and which would be lost and void, if the issue might enter, for then the conusee has no opportunity of making use of it; and for this reason, in Lit. sec. 601. the warranty is held to be a discontinuance, where the grant without the warranty would be none; and the same is also laid down in divers other books, in parallel cases.

[\*15] \*And as to the third question, it was contended, that the entry of the lessor of the plaintiff was barred by the statute of limitations; which enacts, that no person shall enter into any lands, but within twenty years after his right or title shall first descend or accrue. In this case, the first right or title that descended, was a right of action, viz. a formedon, which accrued to the issue immediately on the death of the

tenant in tail, which happened above thirty-five years ago ; and the issue, having neglected for above twenty years to sue for the estate, was thereby barred not only of his *action*, but of his entry also. For otherwise a man might enter into lands, when he had no way by law to recover them, having lost that remedy by his own default ; which would be absurd and inconvenient, with respect to purchasers, and disturbance of long possessors. And in the case of *Saule v. Clarke*, (a) it was adjudged, where tenant in tail leased for life, and afterwards granted the reversion by fine, and died without issue, and he in reversion did not bring his formedon in five years, as he might ; that he could not enter after the death of lessee for life, though then the discontinuance determines here ; because the reversioner had but one right, though several remedies ; and having pretermitted the first, was foreclosed of the second by the statute.

On the *other side* it was contended, that the only question in this case was, whether the lessor of the plaintiff might lawfully enter, after the determination of the estate for three lives, granted by the first fine ; for it was not pretended, that a fine levied in a court of ancient demesne would bar an estate-tail at this day. That the first fine made a discontinuance of the estate, and took away the \*entry of the issue [\*16] in tail, during the lives of the lessee only ; but the grant of the reversion by the second fine did not make a discontinuance in fee ; and, consequently, when the last life dropt, in September, 1693, the discontinuance was determined, and the right of entry revived ; and therefore Richard Gwilym, the issue in tail, might lawfully enter, and was not barred by the statute of limitations, his right not accruing till 1693.

After hearing counsel on this writ of error, it was ordered and adjudged, that the judgment given in the court of common pleas, and the affirmance thereof in the court of queen's bench, should be affirmed.

(a) *Jones*, 208. Cro. Car. 186

The case of *Saule v. Clarke*, (a) above cited was this; A. S. being tenant in tail male, and reversion in fee to John, his eldest brother, made a lease for three lives, not warranted by the statute; then a fine with proclamations was levied by Alexander to one Taylor, and then Alexander died without issue male, living the lessee for life. Five years and more expired in the life of John, after the death of Alexander. John his brother died without issue, Elizabeth, the daughter and heir of Alexander, being niece and heir of John, the lease for three lives expired; and if Elizabeth was barred by this fine and non claim was the question.

And after many arguments at the bar, and after at the bench, all the judges were of opinion that Elizabeth was barred; for when John, who had the *right* at the time of the death of Alexander without issue male, had not prosecuted [¶17] that title, it is a bar; and he shall not have any \*advantage of entry after the death of tenant for life; because he had not any other title after his death than he had before; for his title was by the death of tenant in tail without issue male, and then he might have brought his formedon; and when he doth not pursue his title which first vested, he and his heirs shall be barred; and they shall not have five years after the death of the tenant for life; which reason, it was contended, was agreeable to the case in question.

The (b) court of queen's bench, in the first writ of error brought in the above case of *Hunt v. Burn*, held that, supposing the plaintiff barred of his formedon, yet he is not thereby hindered to pursue his right of entry, which accrued to him by the death of tenant for life; for that is a new right which he had not before: that when a man releases his right, he cannot pursue his action or remedy; but if a man has a right and several remedies, the discharge of one is not a discharge of the other; and that the statute of 4 H. VII. of fines enures and

(a) Lutw. 781.

(b) Salk. 422.

operates by way of bar to the right, which answers *Saule and Clarke's* case; but that the statutes of limitations operate by way of bar to the remedy; [1] and the word *right* in the statute 21 Jac. I. c. 16. is right of entry.

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[1] The Act of Limitations affects the *remedy*, and not the *right*. *Jones administrator vs. Hook's administrator*, 2 *Rand. Rep.* 303. *Graves vs. Grave's Executor*, 2 *Bibb's, Rep.* 207.—*Commonwealth, vs. McGowan*, 4 *Bibb's, Rep.* 63.—& vide to the same purport, *Lord & Al. Executors &c. vs. Shaler*, 3 *Conn. Rep.* 131. *Gustin vs. Brattle*, *Kirby's Rep.* 303.

'It is settled, "That the statute of limitations does *not* destroy the debt:" it only takes away the remedy.' (per LORD MANSFIELD,) *Quantock & Al. assignees vs. England*, 5 *Burr. Rep.* 2626.

## CHAP. II.

### *Right of Entry.*

#### WHEN THE STATUTE RUNS—OF POSSESSION.

RIGHTS of entry are tried in ejectment, in which action the plaintiff recovers on the strength of his own title, and not on the weakness of that of the defendant; (a) he recovers a possession; and the right to that possession, since the statute of 21 Jac. I. c. 16. must have accrued within twenty years of the action brought; therefore, (b) when there hath been no possession within that time, [ 1 ] either in the lessor of the plain-

(a) 5 T. R. 110.

(b) 1 Barr. 119

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[1] It is not necessary, however, that either the lessor of the plaintiff or his ancestors should ever have had *actual possession*; *legal possession* or *seisin in law* is sufficient to sustain his suit. In *Jackson ex dem. Beekman vs. Sellick*, 8 Johns. Rep. 262, it was decided, that where a *feme covert* is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed, so as to enable her husband to become a *tenant* by the curtesy—and KENT, Ch. J. in delivering the opinion of the Court, among other things, said: "There was no *pedis possessio* or possession in fact, of the premises, in the popular sense of the words, by either *Matthews* or his wife during the coverture; for the lands continued vacant, or remained as new lands, wild and uncultivated, from the date of the patent in 1704, to the time of the commencement of the adverse possession in 1772. The title under the Patent to an undivided eighth part of the premises, clearly existed in *Matthews*' wife. She derived it by will from her mother, who was one of the four co-heirs of *Henry Van Ball*. The question is, was she not to be considered as seised in fact of these premises, so as to enable her husband to become a tenant by the curtesy? To deny this, would be extinguishing the title of tenant by the curtesy, to all wild and uncultivated land. It has long been a settled point, that the owner of such lands is to be deemed in possession, so as to maintain trespass. The possession of such property follows the title and so continues, until an adverse

tiff or his ancestors, the plaintiff in this action will be nonsuit.

"possession is clearly made out. This is the uniform doctrine of this Court; and there is no reason why the same rule should not apply where the title by curtesy is in question." And after citing *Co. Litt.* 29. a.; *De Grey vs. Richardson*, 3 Atk. 469, and *Sterling vs. Penlington*, (7 Viner, 149. pl. 11 curtesy A.) he adds; "These cases are as strong as the present, and prove that actual entry or *pedis possessio*, is not absolutely requisite, and that if the party is constructively seised in fact, it will be sufficient."—this case was cited and confirmed in *Jackson ex dem. Austin & al. vs. Howe & al.* 14 Johns. Rep. 406; and in *Jackson ex dem. Swartwout & Ux. vs. Johnson*, 5 Cow. Rep. 102. and in *Jackson ex dem. Woodruff & al. vs. Gilchrist*, 15 Johns. Rep. 117.

It is not necessary, to entitle the owner of land to recover in ejectment, that he should prove, that he, or those under whom he claims, have been in possession within twenty-one years, [*The time limited by the laws of Pennsylvania,*] before bringing suit. Possession by operation of law, accompanies the title, unless the contrary is shewn, and until it is shewn. *Hawk vs. Senseman and others*, 6 Serg. and R. Rep. 21, 23. & vide, *Clay vs. White & others*, 1 Munf. Rep. 162.

Title draws possession to the owner. It remains, until he is dispossessed, and then no further than actual dispossession, by a trespasser, who cannot acquire a constructive possession, which always remains with the title. *Hall & others vs. Powell*, 4 Serg. and R. Rep. 466. & vide *Barr vs. Gratz's heirs*, 4 Wheat. Rep. 222. *Doe ex dem. Arden & al. vs. Thompson*, 5 Cow. Rep. 375.

Actual possession or entry of owner is not necessary where there is no adverse holding. *Lessee of Potts vs. Gilbert*, 1 Journal of Jurisprudence 254, 256. and vide *Lewis, Lessee vs. Beall*, 4 Har. & McHen. Rep. 488.

In order to support even a writ of right, it is not necessary to prove an actual entry under title, or actual taking of seplees, a constructive seisin in deed is sufficient. *Green vs. Lister & others*, 8 Cranch's Rep. 229.

The construction which would require an entry into lands, by the owner, within a limited time after the title accrued, unless there be some adversary title or possession to be defeated by such entry, "is totally inadmissible. How such an opinion could have been entertained is unaccountable. There is no foundation for it"—Per MARSHALL, CH. J. delivering the opinion of the court, in *Shearman vs. Irvine's, Lessee*, 4 Cranch's Rep. 369.

In an action of ejectment, it was held, that an actual entry was not necessary in any case, except to avoid a fine. *Jackson ex dem. Bronck vs. Chrysler*, 1 Johns. Cas. 125.

"An entry adverse to the lawful possessor is not to be presumed. It must appear by proof. In this case it is found, that the title of the heirs was not disputed by any of the settlers, until after

ed, unless he can account for it under some of the exceptions allowed by the statute.

"the peace of 1783. The statute of limitations could not begin to run, until the possession of the defendant was avowedly held in opposition to the rights of the heirs, and the time when that took place was long within the period of twenty years." PER CURIAM. *Jackson ex dem. Gansevoort & al. vs. Parker*, 3 Johns. Cas. 125.

Lapse of time will never bar one out of possession, except where there is one holding adversely. *Harlock & al. vs. Jackson*, 1 *Constit. Rep.* 135.

For the statute of limitations to operate as a bar, the possession must be adverse. *Morris' Lessee vs. Van Deren*. 1 *Dallas' Rep.* 67.

Legal seisin carries with it the possession, unless there be adverse possession. (PER SEWALL, J.) *Proprietors of Kennebeck Purchase vs. Call*, 1 *Mass. Rep.* 484. *S. P. Proprietors of Kennebeck purchase vs. Springer*, 4 *Ibid.* 416.

The possession of a part of a tract of land with title to the whole, is the possession of the whole, except against an adverse possession by actual enclosure for upwards of twenty years. *Gibson vs. Martin*, 1 *Har. & Johns. Rep.* 545. *Proprietors of Kennebeck purchase vs. Springer*, 4 *Mass. Rep.* 416.

"In this country there is no necessity for an entry until an actual adverse possession commences, and that actual adverse possession must be continued for seven years without entry or claim on the other side, before it can toll the Plaintiff's right of entry. The contrary doctrine in this country would be attended with consequences very fatal to titles for land." *Den ex dem. Park vs. Cochran & al.* 1 *Hayw. Rep.* 180. & *vide Den ex dem. Slade vs. Smith*, *Ibid.* 249. *Taylor vs. Buckner*, 2 *Marsh. Rep. (Ky.)* 19.

The Plaintiff in ejectment need not be in actual possession within seven years: if he has a title by deed or grant, he has a constructive possession by operation of law, which preserves his right of entry, until it be destroyed by an actual adverse possession, continued for seven years together; if he has never seen his land—if he has not entered upon it for fifty years, his title may be good, if his adversary hath not, been in possession for seven years continually, during the whole time with a colour of title. *Young vs. Irwin*, 2 *Hayw. Rep.* 11.

"Seisin and possession continue in the owner, until he is disseised; and no further is the possession lost, than of that of which he is actually disseised. This is a doctrine of law familiar to those acquainted with its first rudiments. Possession and the right are preserved together. The rightful owner, in presumption of law, is in the constant possession, until that possession is adversely interrupted and exclusively possessed by another." *Miller & al. vs. Shaw*, 7 *Serg. & R. Rep.* 142. (per DUNCAN J.)

This statute in strictness may be considered to apply only to that species of property whereon an entry could be made; but, like ejectment, it would perhaps be extended beyond those limits.

The crown was not bound by any of these statutes, the ancient doctrine being—"Nullum tempus occurrit regi." [2] But

But in the case of *Den ex dem. Johnson vs. Morris* (2 Halstead's Rep. 6.) it was held, that the lessor of the plaintiff, in an action of ejectment, must always count upon and shew a possession of the Land within the time to which the right of entry is limited: viz. within twenty years next before the action is brought. But he need not shew a possession of twenty complete years, or of any other number of years, further than is necessary to constitute a full and peaceable possession. And the possession to be proved, being a mere matter *in pais*, may be shewn as well without deed as with it; though when without it, it will always be looked upon with greater jealousy, and be overcome with greater ease.

And in the case of *Clay vs. Rymson* (1 Munf. Rep. 455.) The court said, "An ejectment is a possessory action, and only a competent remedy where the lessor of the plaintiff may enter: therefore it is always necessary for the plaintiff to shew that his lessor had a right to enter; by proving a possession within 20 years, or accounting for the want of it under some of the exceptions allowed by the statute."

But the same Court in the case of *Clay vs. White & al.* (1 Munf. Rep. 162, 170) said, (TUCKER, J. delivering the opinion of the Court.) "Upon common law principles, then, I am of opinion that an actual entry into waste and unappropriated Lands granted by the Commonwealth is not necessary, in order to complete the patentee's title thereto; but that the same is, upon the delivery of the Patent, absolute and complete for every purpose whatsoever, whether to maintain an action, or to transmit an inheritance, or to grant the same by Deed, or by last will and testament."—& vide, *See vs. Greenlee*, 6 Munf. Rep. 303.

It seems, that the Statute of 21 Jac. 1. c. 16. did not extend to the Province of Maryland—*Lloyd's Lessee vs. Hensley*, 1 Har. & McHen. Rep. 28.—*Lee's Lessee vs. Bladen & al.* Ibid. 30.—*Drane vs. Hodges*, Ibid. 518.

[2] The Statute of Limitations does not run against the Commonwealth—*Commonwealth vs. McGowan*, 4 Bibb's Rep. 62.—& vide *Kemp vs. Commonwealth*, 1 Hen. & Munf. Rep. 85—*Nimmo's Exors. vs. Commonwealth*, 4 Ibid. 57.



by a late statute, (a) the crown is barred from recovering any estate or hereditaments (other than liberties or franchises) where the title did not first accrue within the last sixty years.[3]

(a) 9 G. III. c. 16.

The Commonwealth cannot be disseised; neither does the Statute of Limitations run against the Commonwealth—*Chiles vs. Calk*, 4 *Bibb's Rep.* 554.

The maxim *nullum tempus occurrit regi* applies to the State; and no title to Lands can be acquired against the State, by the statute of limitations. The statute of limitations cannot bar an escheat, or give a right to escheated property.—*Harlock & al. vs. Jackson*, 1 *Constit. Rep.* 135. (But a promissory note given to the Commissioners of the Roads or even to the Treasurer for the use of the State is "not exempt from the operation of the statute of limitations." *Treasurer, vs. Exr. of Carmichael*, 2 *Rep. Const. Court. So. Car.* 206.)

Possession cannot be pleaded against the Public, unless it is immemorial. *Allard & al. vs. Lobau*, 3 *Martin's Rep. N. S.* 294.

Statutes of Limitations do not run against the United States.—*United States vs. Hoar*, 2 *Mason's Rep.* 312.

The People not being named in the fifth section of the *Act for the Limitation of Criminal prosecutions and of actions at law*, (*N. R. L.* 184, *Sess.* 24 *Ch.* 183) are not bound by it and may bring a personal action at any time.—*The People vs. Gilbert*, 18 *Johns. Rep.* 227.—*Wilcox qui tam. vs. Fitch*, 20 *Johns. Rep.* 475.

"No laches can be imputed to the Government and against it "no time runs so as to bar its rights." *Stoughton & al. vs. Baker & Al.* 4 *Mass. Rep.* 528. (*Per PARSONS, CH. J. delivering the opinion of the Court.*)

"The Commonwealth cannot be affected by the Act of Limitations." *Johnston, vs. Irwin*, 3 *Serg. & R. Rep.* 292. (*Per TILGHMAN, CH. J. delivering the opinion of the court.*)

A *Felo de se.* was at the time of his death, the payee and holder of a promissory note after his death, the crown transferred the note to the plaintiff. Held; That the defendant's plea, [that said note became due and payable to *Felo de se.*, & *Actio non accrevit ei, infra sex annos.*] did not shew that *Felo de se.* "was barred by the statute "at the time of his death, and if he was not so barred, then a "right vested in the crown, and the rights of the crown are not "barred or affected by the statute. The crown is not within the "operation of the statute." *Lambert vs. Taylor & al. Exors. &c.* 4 *Barn. & Cress. Rep.* 138.

[3] By the 1st section of the Act of the Legislature of the State of New-York, entitled "An Act for the Limitation of Crim-

\*And also ecclesiastical(a) persons are not bound [\*19] by any of the statutes of limitations, because it would be a side-wind, to evade the statutes made to prohibit their alienations. With these exceptions, it applies to all persons capable of a right to enter.

It runs immediately on a possession adverse to the true owner's title, [ 1 ] and after twenty years takes away his right of possession, and confers a positive title to the defendant; for although Lord Raymond reports it to have been held in the case of *Reading against Rawsterne*, (b) that the statute of limitations does not bar a man but where there is an actual disseising; and by Salkeld, (c) that the statute never runs against a man but where he is actually ousted or disseised; the court must have considered the terms ouster and disseisin as synonymous, and used them indifferently, otherwise that was not the true construction of this statute.

Seisin, (d) in its genuine meaning, denotes the completion of that investiture, by which the tenant was admitted into his free-

(a) Comp. Incumb. 429. (b) Ld. Raym. 829. (c) Salk. 423. (d) 1 Burr. 107.

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inal Prosecutions and of Actions at Law;" passed 8th April, 1801, (1 R. L. 184) All suits by the State, "for or in respect to "any lands, tenements or hereditaments, other than liberties or "franchises, or the issues or profits thereof," are limited to forty years.

A constructive possession of lands under colour of title, for twenty-one years, under known and visible boundaries or lines, will not bar the right of entry under the State.—Nor will the actual possession for twenty-one years of different parts of the lands covered by colour of title, by purchasers from him to whom the colour of title was made, avail him as to the parts of the lands not sold and actually possessed. For they are distinct tracts, held by different persons in different rights. *Doe ex dem. Clinton & al. vs. Herring*, 1 *Murph. Rep.* 414.

[1] Vide note A. in the appendix: where all the American authorities, and the late English decisions, on the subject of "*adverse possession*," are collected and arranged.

hold. [2] And disseisin, therefore, must mean, some way or

[2] Seisin, as above defined, could only be applicable to *feudal tenures*; nor is such definition sufficiently broad, to extend, in all cases, even to them.

The definition given by Lord MANSFIELD, in *Taylor ex demiss. Atkyns vs. Horde & al.* (1 Burr. Rep. 107) and from which the definition in the text is abridged, is in the following words:

"Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure; and without which no freehold could be constituted or pass. "*Sciendum est feudum, sine investitura, nullo modo constitui posse.*"

From this definition, it is apparent that *seisin*, as above defined, could never exist where lands were held in *pure allodium*; and of course, that there could be no *seisin*, technically, of the greater part of the land in the state of New-York; for by the 6th section of the statute of that state, entitled "*An act concerning tenures*," passed 20th February, 1787, it is enacted, "That the tenure upon all gifts, grants, and conveyances heretofore made or hereafter to be made, of any manors, lands, tenements or hereditaments, of any estate of inheritance, by any letters patent under the great seal of this state, or in any other manner, by the people of this state, or by the commissioners of forfeitures, shall be and remain *allodial*, and not *feudal*, and shall forever hereafter be taken and adjudged to be and continue in free and pure *allodium* only."

And, what, it may be asked, constituted *seisin* in lands in England, prior to the introduction of *Feuds*, at the Norman conquest?

In the case of *Green vs. Lister & others*, (8 Cranch's Rep. 244, 245, 246) where the important question in the cause was, What constituted *seisin*? STORY, J. in delivering the opinion of the supreme court of the United States, thus expressed himself:

"It is well known that in ancient times, no deed or charter was necessary to convey a fee simple. The title, the full and perfect dominion, was conveyed by a mere livery of *seisin* in the presence of the vicinage. It was the notoriety of this ceremony, performed in the presence of his peers, that gave the tenant his feudal investiture of the inheritance. Deeds and charters of feoffment were of a later age; and were held not to convey the estate itself, but only to evidence the nature of the conveyance. The solemn act of livery of *seisin* was absolutely necessary to produce a perfect title, or as Fleta calls it, *juris et seisinæ conjunctio*."

"If then an actual *seizin* or *seizin* in deed, be necessary to be proved, it becomes material to enquire what constitutes such a *seizin*. It has been supposed, in argument, that an actual entry under title, and perception of *esplees* were necessary to be proved in order to shew an actual *seiziq*. But this is far

other, turning the tenant out of his tenure, and usurping his place and feudal relation. [ 3 ]

“ from being true, even at the common law. There are cases in which there is a constructive seizin in deed, which is sufficient for all the purposes of action in legal intendment. In *Hargrave's* note, 3 Co. *Litt.* 24. [29] a, it is said, that an entry is not always necessary to give a seizin in deed; for if the land be in lease for years, curtesy may be without entry or even receipt of rent. The same is the doctrine as to seizin in a case of *possessio fratris*. So if a grantee or heir of several parcels of land in the same county enter into one parcel in the name of the whole, where there is no conflicting possession, the law adjudges him in the actual seizin of the whole. *Litt. s.* 417. 418. In like manner, if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently, by such claim, a possession and seizin in the land, as well as if he had entered in deed. *Litt. s.* 419. And living within view of the land will, under circumstances, give the feoffee a seizin in deed as effectually as an actual entry. There are, therefore, cases in which the law gives the party a constructive seizin in deed. They are founded upon this plain reason, that either the claim is made sufficiently notorious by an actual entry into part, of which the vicinage can take notice, or the party has done all that under the circumstances of the case, he was bound to do. *Lex non cogit seu ad vana aut impossibilia*. The same is the result of coveyances, deriving their effect under the statute of uses; for there, without actual entry or livery of seizin, the bargainee has a complete seizin in deed. *Com. Dig. Uses*, [B.1.] [1.] *Cro. Eliz.* 46.—1 *Cruise's Dig.* 12.—*Shep. Touch.* 223, &c. *Harg. Co. Litt.* 271 note.”

Lord COKE says, “ And in the case of a devise by will of lands whereof the devisor is seised in fee, the freehold or interest in law is in the devisee before he doth enter, and in that case nothing (having regard to the estate or interest devised,) descendeth to the heir.” 1 Co. *Litt.* 111 a. This doctrine is recognized and confirmed in *Clay vs. White & Al.* 1 *Munf. Rep.* 172.

Now in such cases as those above mentioned, what constitutes the completion of the investiture by which the tenant was admitted into the tenure.” ?

“ According to Lord HOLT, (1 *Salk.* 246.) a bare entry on another, without an expulsion, makes such a seizin only, that the law

[3] It must be obvious, that where “feudal relations” do not exist, either actually or impliedly, the definition given in the text cannot be applicable.

It is obvious how a man may visibly be the copyholder or customary freeholder *de facto*, in prejudice of the rightful tenant:

"will adjudge him in possession that has the right. This court has frequently recognised the same rule, that an entry not appearing to be hostile, was to be considered an entry under the title of the true owner." *Smith ex dem. Teller & Al. vs. Burtis & Al.* 6 Johns. Rep. 218. (per KENT, Ch. J.)

The extent of an execution on lands gives the creditor an actual seizin of the lands. *Wyman vs. Bridgen*, (4 Mass. Rep. 150.)

The extent of an execution upon land not belonging to the judgment debtor gives no seizin thereof to the creditor. *Bott vs. Burnell*, 9 Mass. Rep. 96. *Same vs. Same*, 11 *Ibid.* 163 *Gore vs. Brazier*, 3 *Ibid.* 539.

"Although there may be a concurrent possession, there cannot be a concurrent seizin of lands." *Langdon vs. Potter & Al.* 3 Mass. Rep. 219. (per PARSONS, Ch. J. delivering the Opinion of the Court.) *Proprietors of Kennebeck Purchase vs. Call*, 1 Mass. Rep. 488.

"In every case of a mixed possession, the legal seizin is according to the title." *Codman & Al. vs. Winslow*, 10 Mass. Rep. 151. *Commonwealth vs. Dudley*, *Ibid.* 408.

The seizin of lands belonging to the Indian tribes is in the Sovereign, and the Indians are mere occupants. *Jackson ex dem. Sparkman vs. Porter*, 1 Paine's Rep. 457. *Johnson vs. McIntosh*, 8 Wheat. Rep. 588, 592, 595, 596. *Fletcher vs. Peck*, 6 Cranch's Rep. 142. & vide *Cocke's Lessee vs. Dotson & Al.* 1 Ten. Rep. 169.

In the case of *The Proprietors of township Number Six vs. Jones*, (12 Mass. Rep. 337.) PARKER, Ch. J. delivering the Opinion of the Court, said, "But their [the Demandants'] title commenced in 1762, by the grant of the Provincial Legislature: which, although depending upon the approbation of the Crown, which was never obtained, conveyed a seizin to the Proprietors; and the resolves of the Legislature after the revolution, both in terms and legal effect, amounted to a confirmation of a defeasible title before existing."

In the case of *Adams vs. Frothingham*, (3 Mass. Rep. 352. 363.) the tenant's counsel insisted at the trial the demandant's ancestor could have been seized of the flats [part of the demanded premises] only as they in fact existed at his death, and that none which had been made by *Alluvion* could be recovered by the present demandant, who counted not on her own seizin, but only on the seizin of her ancestor. But the Judge directed the jury that, if the Ancestor were seized of the flats within sixty years, whatever increase there had been, rightfully accrued to the demandant as his heir. The jury found a verdict for the demandant, and the tenant, upon a bill of exceptions, moved for a new trial; but the

It is obvious too, that usurping such copyhold or customary tenure, is a different fact from a naked possession or occupation of the land.

\*Disseisin was a complicated fact, and differed from [ \*20 ] dispossessing. The freeholder by disseisin differed from a possessor by wrong. [ 1 ] Bracton, c. 2. *de Assisa No-*

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Court Held, That whatever increase happened from natural causes, or from an union of natural and artificial causes, must be to the benefit of him who owned the flats to which the increase was attached ; they said " This increase is of necessity gradual and imperceptible. " No man can fix a period when it began. No testimony can mark " the exact margin of the channel on any given day or year. The " ancestor being seized of the estate, of which all the flats now de- " manded are part, and having the right by law to all such addi- " tions as should be made by the gradual retiring of the waters, " he must be supposed to have been seized of all which now ex- " ists, for no one can shew any parcel of which he was not seiz- " ed. We think the Opinion of the Court, delivered at the trial, " right on this point."

" The law upon this subject seems to be very well settled, when " a man is once seized of land, his seisin is presumed to continue, " until a disseisin is proved. When a man enters on land claim- " ing a right or title to the same, and acquires a seizin by his en- " try, his seizin shall extend to the whole parcel, to which he has " right ; for in this case an entry on part is an entry on the whole." *Proprietors of the Kennebeck purchase vs. Springer*, 4 Mass. Rep. 417, 418. (per PARSONS, Ch. J. delivering the Opinion of the Court.)

" It is also well settled that where there is evidence of a law- " ful title accompanied with seisin and possession, it is presumed " to continue in the lawful owner, and his heirs and assigns, until " an actual ouster and disseisin shall be proved." *Brimmer vs. The Proprietors of Long Wharf*, 5 Picker. Rep. 135. (per PUTNAM, J. delivering the Opinion of the Court.)

[1] But the Disseisor is a " possessor by wrong," his possession is not only held, but was originally acquired by wrong.

" Disseisin is an estate gained by wrong and injury ; and therein it differs from dispossession which may be by right or wrong. This is the uniform language of the best authorities from the time of Littleton. (Litt. s. 279. Co.Litt. 3. b. 18 b. 163 b. 181. a. Cro. Jac. 685. 1 Salk. 246. n 2. 1 Burr. 109.)" Per KENT, Ch. J. delivering the Opinion of the Court in *Smith ex dem. Teller & Al. vs. Burtis & Al.* 6 Johns. Rep. 217. *Doe ex dem. Arden & Al. vs. Thompson*, 5 Cow. Rep. 374.

*re Disseisinæ*, fo. 160. puts many cases of possession wrongfully taken, which he calls intrusion; because there is no disseisin: "*Possessio quæ nuda est omnino, et sine aliquo vestimento, quæ dicitur intrusio.*" *Vestimento* is seisin, investiture; (from whence the Saxon word *Vest*;) a metaphor the feudists took from clothing: by which they meant to intimate, "that the naked possession was clothed with solemnities of the feudal tenure.

After the assise of novel disseisin was introduced, the legislature, by many acts of parliament, and the courts of law, by liberal constructions in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property; if, by bringing his assise, he thought fit to admit himself disseised.

Littleton, who wrote long after the remedy by assise was enlarged, and speaks of disseisins with an eye to that remedy, defines disseisin [2] with an &c.(a) Where a man enters into

(a) Litt. sec. 279.

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[2] "A mere entry upon another is no Disseisin, unless it be "accompanied with expulsion, or Ouster from the freehold."—*Smith ex dem. Teller & Al. vs. Burtis & Al.* 6 Johns. Rep. 217 (per KENT, Ch. J. delivering the Opinion of the Court.) *Dor ex dem. Arden & Al. vs. Thompson*, 5 Cow. Rep. 374 (per WOODWORTH, J. delivering the Opinion of the Court.) *Jackson ex dem. Van Alen vs. Rogers*, 1 Johns. Cas. 36. & vide *Jackson ex dem. Hardenbergh & Al. vs. Schoonmaker*, 4 Johns. Rep. 390.—*Simpson & Al. vs. Shannon's Heirs*, 3 Marsh. Rep. (Ky.) 463. *Norcross, Executrix vs Widgery*, 2 Mass. Rep. 508—*Jackson ex dem. June, vs. Raymond*, 1 Johns. Cas. 86 (note.)

"A peaceable entry upon Land, apparently vacant, furnishes, "per se, no presumption of wrong." 6 Johns. Rep. 218.—5 Cow. Rep. 574.

The Disseisor is "bound to shew his tortions seisin affirmatively." 5 Cow. Rep. 374.—6 Johns. Rep. 118.

Where the entry is congeable, it cannot work a Disseisin. *Ricard vs. Williams & Al.* 7 Wheat. Rep. 107. 6 Johns. Rep. 218. *Higginbotham & Al. vs. Fishback*, 1 Marsh. (Ky.) Rep. 506. 6 Johns. Rep.

lands, or tenements, (where his entry is not congeable,) and

218—5 *Cow. Rep.* 374. *Jackson ex dem. Van Alen, vs. Rogers*, 1 *Johns. Cas.* 37. 47. *Jackson ex dem. June vs. Raymond* *Ibid.* 86. (in note.) & vide *Brown vs. Porter*, 10 *Mass. Rep.* 100.

"It has been decided in our Courts, that to constitute a Disseisin, in, upon which a descent may be cast, it must be commenced by "wrong, and founded on an ouster of the true owner. There "must be a Disseisin in fact." 5 *Cow. Rep.* 374. 6 *Johns. Rep.* 216. 7 *Wheat. Rep.* 107.

"The Law will never construe a possession tortious unless from "necessity. On the other hand, it will consider every possession "lawful, the commencement and continuance of which, is not proved to be wrongful." *Ricard vs. Williams & Al.* 7 *Wheat. Rep.* 107—(per STORY, J. delivering the Opinion of the Court.) See vide *Den ex dem. Clark vs. Lane*, 1 *Penn. Rep.* 417, *Contra*, (ut semble.)

There cannot be an actual ouster of a Reversion.—*Doe ex dem. Truscott vs. Elliot*, 1 *Barn, and Ald. Rep.* 86.

If A. be tenant of the freehold, and B. tortiously enter upon, and turn the sub-tenant of A. out of possession, claiming the land as his absolute property; and he, or those claiming under him, continue to hold the same, by actual adverse possession, until the death of A., this is an actual disseisin of A.—*Davis & Ux vs. Martin*, 3 *Munf. Rep.* 285.

Tenant for life levied a fine, and afterwards devised the premises, and died seised; the Devisee (the Defendant in Ejectment,) entered and continued in possession; and his counsel contended that this case fell within the definitions of a Disseisin which had been referred to from *Littleton* and Lord *Coke*. But Lord ELLENBOROUGH, Ch. J. answered him, thus: "All the Definitions include an Ouster of the tenant, a wrongful putting of him out: "and there lies your difficulty: there is an entry of the one party, "but what Ouster or putting out of the other is there?"—*Williams Lessee of Hughes & Ux. vs. Thomas*, 12 *East's Rep.* 141, 152.

In the Case of *The Proprietors of the Kennebeck purchase vs. Springer* (4 *Mass. Rep.* 418, 419.) PARSONS, Ch. J. delivering the Opinion of the Court, said: "When a man not claiming any right "or title to the Land shall enter on it, he acquires no seisin, but by "the Ouster of him who was seized, and he is himself a Disseizor. "To constitute an Ouster of him who was seized, the Disseizor "must have the actual exclusive occupation of the Land, claiming "to hold it against him who was seized, or he must actually turn "him out of possession. When a Disseizor claims to be seized by "his entry and occupation, his seizin cannot extend farther than "his actual exclusive operation; for no farther can the party "seized be considered as ousted: for the acts of a wrongdoer



ousteth him which hath the freehold, &c. the comment says,

"must be construed strictly, when he claims a benefit from his own wrong."

"On considering the evidence we are satisfied that the Demandants were not disseized until 1792, by the entry of the Tenant: that the running round the Land by a Surveyor, and marking the lines, by the direction of one who claims no title to the Land, is not such an exclusive occupation of the Land as can amount to an Ouster or Disseizin of the Demandants. Neither can the occasional cutting of the grass on the meadow by *Springer*, who does not appear to have claimed the land, amount to disseizin."

"To constitute a disseizin of the Owner of uncultivated Lands, by the entry and occupation of a Party not claiming title to the Land, the occupation must be of that nature and notoriety, that the Owner may be presumed to know, that there is a possession of the Land adverse to his title: otherwise a man may be disseized without his knowledge, and the Statute of Limitations may run against him, while he has no ground to believe that his seizin has been interrupted."—& *Vide Watrous vs. Southworth*, 5 *Conn. Rep.* 305, 311.

Where one enters upon land under a Deed duly acknowledged and recorded, he acquires a freehold either by right or wrong: if by wrong, it is an actual disseizin of all claiming the land under a different title.—*Higbee & Al. vs. Rice*, 5 *Mass Rep.* 344.

An entry on land under a Deed recorded, and payment of taxes, is no evidence of a Disseizin of the true owner, unless the person who entered has continued openly to occupy and improve it.—*Little vs. Megquier*, 2 *Greenl. Rep.* 176.

"After a Mortgage, if the Mortgagor remains in possession, it is not a disseizin of the Mortgagee."—*Gould vs. Newman*, 6 *Mass. Rep.* 241 (*per PARSONS*, Ch. J. delivering the opinion of the Court.)

To constitute a disseizin, the possession of the Disseisor must have been adverse to the title of the true owner, as well as open, notorious, and exclusive.—*Little vs. Libby*, 2 *Greenl. Rep.* 242.

Where one had driven piles in the ground which was covered by a Mill pond belonging to another, and had erected and maintained buildings on the said piles for sixty years, the water flowing between the piles, it was held to constitute a Disseizin of the Owner of the Mill-pond, and he was barred of his right to the land so occupied.—*Boston Mill Corporation vs. Bulfinch*, 6 *Mass. Rep.* 229.

If a man enters upon land under a Deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy, and improvement of only a part of it, such occupation and improvement, unless controlled by other facts, is a

"Every entry is no disseisin, unless there be an ouster of the

disseisin of the true owner, as to the whole tract ;—because the extent and nature of his claim may be known by inspection of the public Registry ; for the 6th Section of the Act of Limitation, of Maine, Ch. 2. was enacted to abolish the distinction existing between a possession under a *Deed recorded*, or a possession without such title.—*Proprietors of Kennebeck purchase vs. Laboree & Al. 2 Greenl. Rep. 275 & vide S. P. Little vs. Megquier, Ibid 176.*

In the case of *Pray vs. Pierce*, (7 *Mass. Rep. 381. 383.*) The tenant read in evidence a Deed from one *James Witherill*, a Collector of Taxes, to one *Charles Clark*, dated October 18th, 1791, duly executed and recorded December 15th, 1792, wherein for the consideration of, &c. the said Collector granted, &c. the demanded premises in fee, saving to the owner the right of redeeming the same.

There was no evidence that the said collector had conformed to the requirements of the law, in relation to the sale of the land ; *Clark*, under colour of the said conveyance, fenced the land and depastured his cows upon it ; he demised it by parol to the tenant, *Pierce*, who occupied it, under the said demise from the year 1798, to the time of trial, at October Term, 1810.

The Demandant showed a regular chain of title to the demanded premises, by sundry conveyances (commencing in the year 1779) down to *Ivory Hovey* ; and also a Quit-claim Deed, dated February 1st, 1793, duly executed, and recorded June 24th, 1794, wherein the said *Hovey* in consideration, &c. conveyed the demanded premises, together with other parcels of land to the Demandant, *Pray*.

On the trial a verdict was rendered for the Demandant, and upon a motion for a new trial upon Exceptions taken by the tenant, the COURT said—"Another exception is, that at the time when *Hovey* conveyed to *Pray*, the Demandant, *Hovey* was disseized by *Clark*, under whom the tenant claims.

"This objection must depend upon the facts which are in the Case. From *Hardison's* testimony it is evidence, that he had the care of the land for *Hovey*, until he understood that *Hovey* had made a conveyance of it to the Demandant. To control this testimony, the tenant has produced to us testimony that *Clark*, previous to the conveyance from *Hovey* to the Demandant, had under color of the Collectors conveyance to him, fenced the land, and depastured his cows upon it. But there was no evidence that *Hovey* had any notice of these acts of *Clark*. Unquestionably had *Clark* had a good title, and had he under that title done those acts, it would have been good evidence of a legal seizin in him. But as nothing passed by the Collector's deed to him, those acts of his must be deemed to be trespass-

freehold." And Co. Litt. 153. says, "Disseisin is putting a

"ses. But they cannot amount to an Ouster of *Hovey*, until  
"evidence that *Hovey* had notice of them. Otherwise a private  
"act of trespass on the soil of another might be evidence of an  
"Ouster, without any knowledge on the part of the owner of the  
"land. This notice may be proved either by direct evidence  
"of the fact; or the Jury may presume it from circumstances  
"in evidence; as when it is proved that the Owner's Cattle  
"have been turned off the land, or his servant's refused an en-  
"try, &c.; or a continuance of the trespass for a long time is  
"shewn, when the Owner or his Agent lives in the neighbour-  
"hood. But whatever may be the evidence of this notice, it  
"is a fact to be found by the Jury, and the Court cannot pre-  
"sume it. And as, in the case before us, this notice is not  
"stated as a fact proved, *Hovey* must be considered as seiz-  
"ed at the time of his conveyance to the Demandant: and  
"so this objection fails."

In the case of *Small vs. Procter* (15 *Mass. Rep.* 498) WILDE J. delivering the Opinion of the Court, said—"Whatever may have  
"been the ancient doctrine of disseizin, in relation to feudal  
"tenures, it has ever been held in this State, that an entry on  
"vacant or uncultivated land, by one claiming to hold it, hav-  
"ing no right, and without permission of the Owner, accompani-  
"ed with occupation or open visible possession, is sufficient to  
"constitute a disseizin. This principle has been too frequent-  
"ly recognized to be now controverted. (4 *Mass. Rep.* 416.—  
"6 *Mass. Rep.* 229.—14 *Mass. Rep.* 200.)

"Disseizin does not necessarily imply a forcible entry, or an actu-  
"al ouster by violence or fraud: for in cases of vacant possessions,  
"a simple tortious entry and open exclusive possession under  
"claim of adverse title, are equivalent to such entry and Ous-  
"ter."—& vide *Hall & Al. vs. Powel*, 4 *Serg. & R. Rep.* 465.

A conveyance by a Disseisee is unlawful and void, but the  
title remains in the grantor; so that in a writ of entry, the  
tenant cannot plead that the Demandant, after the Disseisin,  
made such an unlawful conveyance, and that the action is  
brought at the expense and for the use of the grantee in pur-  
sueance of an unlawful agreement between him and the Grant-  
or.—*Brinley vs. Whiting*, 5 *Picker. Rep.* 348.

One joint-tenant cannot convey a part of the land holden in  
joint-tenancy by metes and bounds to a stranger nor can one  
entering under such a conveyance be a Disseizor of the other  
joint-tenants; for one joint-tenant cannot be disseized by a stran-  
ger unless all are disseized, and the Grantor was not disseiz-  
ed, as the Grantee entered by his consent. The Grantee in  
such a conveyance therefore gains no seizin either by right  
or by wrong.—*Porter vs. Hill*, 9 *Mass. Rep.* 34.

man out of seisin, and ever implies a wrong: but dispossession or ejectment is putting out of possession, and may be by right or wrong.—*Disseisin est un personal trespass de tortious ouster del seisin.*"

\*Since the remedy by assise of novel disseisin, actual disseisin means a disseisin as it was understood to [ \*21 ]

"A Disseisin may be purged either by the Disseisor's abandonment of the possession, or his consent to hold under the Disseisee."—*Small vs. Procter*, 15 Mass. Rep. 499, (per WILDE, J. delivering the Opinion of the Court.)

Whether an Infant can be disseised, and is then bound to bring his action within ten years after coming of age?—*Quere, Jackson ex dem. Rensselaer vs. Whitlock*, 1 Johns. Cas. 213.

There can be no Disseisin of an equitable estate.—*Marquis Cholmondeley & AL vs. Lord Clinton & AL* 2 Meriv. Rep. 361.

In the case of *William, Lessee of Hughes & Uz. vs. Thomas*, (12 East's Rep. 154,) Lord ELLENBOROUGH, Ch. J. said—"Now here tenant for life levied a fine, and continued in possession till her death; having devised to the defendant, who after her death, entered and continued in possession; and this is contended to be of necessity a disseisin: but what act has he done to make him a disseisor? The lessor of the plaintiff never was in possession, and therefore could not be disseised or put out of possession. It does not even appear that the defendant was cognizant of the claim of the lessor. Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the Lord's Court. But what act of notoriety is here stated to have been done by the defendant, as claiming to put himself in the place of the rightful freeholder? It would be carrying the doctrine of disseisin further than any other case has done, to say, that the mere taking of the rents and profits, as devisee of the land, is a disseisin, without meaning to do this adversely to the party entitled; for it does not even appear that when he entered he knew of the lessor's claim."

"And it is also to be observed, that the acts of disseisors are, in respect to the lawful owner or true proprietor, to be limited to an actual ouster and exclusive occupation of such disseisors, and shall not be extended by construction according to their claims under invalid deeds or other conveyancing."—*Brimmer vs. the Proprietors of long Wharf*—5 Picker. Rep. 135, (per PUTNAM J., delivering the Opinion of the Court.)

be before that time; and is so called to distinguish it from disseisin at the election of the party. [ 1 ]

[1] "It has also been argued at the bar, that a person who commits a disseisin cannot qualify his own wrong, but must be considered as a disseisor in fee. This is generally true; but it is a rule introduced for the benefit of the disseisee, for the sake of electing his remedy. For, if a man enter into possession, under a supposition of a lawful limited right, as under a lease, which turns out to be void, or as a special occupant, where he is not entitled so to claim, if he be a disseisor at all, it is only at the election of the disseisee (*Com. Dig. Seisin. F. 2 & F. 3. 1 Roll. Abrid. 662. l. 45. Id. 661. l. 45.*) There is nothing in the law which prevents the disseisee from considering such a person a mere trespasser at his election; or which makes such an entry, under a mistake for a limited estate, a disseisin in fee absolutely, and, at all events, so that a descent cast would toll the entry of the disseisee." *Ricard vs. Williams, 7 Wheat. Rep. 107 (per STORY, J. delivering the Opinion of the Court:—& vide, Proprietors of Kennebeck purchase vs. Call, 1 Mass. Rep. 488. William, Lessee of Hughes & Ux. vs. Thomas, 12 East. Rep 152.*

"The distinction between a disseisin by election, as contradistinguished from a disseisin in fact, ~~was~~ taken for the benefit of the owner of the land, and to extend to him the easy and desirable remedy by assize, instead of the more tedious remedy by a writ of entry. Whenever an act is done which of itself works an actual disseisin, it is still taken to be an actual disseisin, as if a tenant for years, or at will, should enfeof in fee. On the other hand, those acts which are susceptible of being made disseisins by election are no disseisins till the election of the party makes them so, as if a tenant at will, instead of making a feoffment in fee, should only make a lease for years." *Jackson ex dem. Van Alen vs. Rogers, 1 Johns. Cas. 36, 37. (per KENT, J.) Ibid. 43.*

"Making a devise has been deemed an intimation of an election not to be disseised, (*Pously vs. Blackman, Palm. 205. Cro. Jac. 659.*)"—1 *Johns. Cas. 37. 44—2 Caine's Cas. Er. 316.*

"The conveyance in fee of the tenant was a disseisin of the landlord, or not, at his election. For the sake of his remedy, he had a right to consider the grantee a disseisor. But he cannot constitute himself a disseisor in spite of his landlord." *Jackson, ex dem. Van Schaick & Al. vs. Davis, 5 Cow. Rep. 134. per SUTHERLAND, J. delivering the Opinion of the Court.*

Where there has been an actual disseisin, the disseisee cannot elect to consider himself as not disseised. *Davis & Ux. vs. Martin, 3 Munf. Rep. 285.*

If the statute of limitations did not bar a man, but where he was actually disseised, it would be nearly inoperative, as it would require him to have a right to the freehold, and also a right of entry, which do not always unite; for an actual disseisin can only be of the freehold; and the statute applies to rights of entry.

Also, the specific, the only remedy to enforce a right of entry, is by ejectment; and where (a) an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease; but there is no real or supposed re-entry, after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry.

It would also defeat the intention of the legislature, in setting at large from the operation of the statute all estates less than freehold: and an ejectment might be maintained on a right of entry accrued five hundred years before.

And with respect to the defendant it would require, that he should not only have turned the real owner out of his possession, but that he should have vested himself in the seisin; that he should have clothed his naked possession with the solemnities of the feudal tenure. [ \*22 ]

The case in which the court put the above construction on the statute of limitations was, where a stranger entered upon the lands, and received the profits, with the true owner, for more than twenty years; the words actual ouster must have been used with reference to that circumstance, and to distinguish such an entry from an entry where the owner is put out of possession, and not as a general rule; because a very small proportion of the rights to enter accrue from a personal violence; and yet it is conceived that this statute runs on every such right.

(a) 1 Burr. 311.

It was observed by Lord Mansfield, (a) "that some ambiguity seemed to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if turning out by the shoulders were necessary; but that is not so: A man may come in by rightful possession, and yet hold over, adversely without a title. If he does, such holding over, under circumstances, would be equivalent to an actual ouster. For instance, length of possession under a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title; but if tenant *par autre vie* hold over for twenty years after the death of *cestuy que vie*, such holding over will, in ejectment, be a complete bar to the remainder-man, or reversioner, because it was adverse to his title.

The plaintiff (b) must show a right of possession as well as of property: and therefore the defendant need not [ \*23 ] . \*plead the statute of limitations as in other cases. In *Taylor, ex dem. Atkins, v. Horde*, the defendant pleaded the general issue; and the jury found a special verdict: the court determined for the plaintiff on the right, but against him on the remedy; for they held that he was barred by the statute of limitations. (c) On which judgment he brought a writ of error in the house of lords; who determined the latter point first and separately; and, holding the plaintiff to be barred of his remedy by ejectment, affirmed the judgment, without entering into the other point upon the right.

But the verdict must show how the possession has been: In the case of *Jones v. Morley*, (d) there was an uncertainty in that respect, upon the special verdict, so that there might have been a question whether the lessor of the plaintiff were not barred by the statute of limitations. And by the court, if Anne were out of possession in 1667, when her husband Edward Morley died, then the statute of limitations took place from that time, and so the plaintiff might be within the statute; but that is not found

(a) Cowp. 217. (b) 4 Burr. 119. (c) Run. Eject. 59. (d) Ld. Raym. 287.

by the jury expressly, and the statute of limitations shall not be taken by construction to bar a man of his action, unless it be expressly found how the possession hath been.

And an uninterrupted possession for twenty years gives a complete possessory right. If H.(a) has possession of lands for twenty years uninterrupted, and then B. gains possession, upon which H. brings ejectment; though H. is plaintiff, yet his possession for twenty years will be a good title for him, as well as if H. had been \*then in possession, because [ \*24 ] possession for twenty years now by virtue of the statute 21 Jac. I. c. 16. s. 1. is like a descent at common law, which tolls the entry.

Possession is either in fact, or in contemplation of law, and in either case, while it remains in the owner, the statute does not run; [ 1 ] therefore, if a stranger enter upon the true owner, and they divide the profits for more than twenty years, the true owner may maintain ejectment notwithstanding, for the other moiety, because he was never out of possession.

A. being (b) seised in fee of lands, had issue two daughters B. and C. B. marries, and has issue D., and dies; A. devises the land to D. and his heirs, and dies; D. dies; and the heir of D. of the part of his father, and the heir of D. of the part of his mother, entered into the lands, and took the profits for more than twenty years before this action brought; which action was brought by the plaintiff as devisee of ——— Bernard, who was heir of D. of the part of the father of D.

A question was, whether the taking of the profits by the heir of the part of the mother of one moiety, should not bar the heir of the part of the father, after quiet enjoyment for twenty years, by the statute of limitations, from bringing an ejectment. And

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(a) *Ld. Raym.* 741.

(b) *Ld. Raym.* 522.

[1] Vide page 18, note [1.]



the whole court held that it should not. For (by them) the statute of limitations does not bar a man, but where there is an actual disseising. Now here the bare taking of the profits is not an actual disseising. Besides that where two men are in possession of land, &c. the law adjudges it to be the [ \*25 ] \*possession of him who hath the right, until he be actually disseised. [ 1 ] The lessor of the plaintiff and the defendant were not tenants, for the defendant was a mere stranger; and though he took a moiety of the profits, that would

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[1] Vide page 18, note [1] & note (A.) in the appendix.

Where two persons are in possession of land, each claiming an exclusive right, the Law adjudges the rightful possession to be in the one who has the right to the land. *Mather vs. The Ministers of Trinity Church*, & Al. 3 Serg. & R. Rep. 509. & to the same purport, *vide Jackson ex dem. Sparkman vs. Porter*, 1 Paine's Rep. 458. *Burns vs. Swift* & Al. 2 Serg. & R. Rep. 436. *Cluggage & Al. vs. Lessee of Duncan*, 1 Serg. & R. Rep. 11. *Davidson's Lessee vs. Beatty*, 3 Har. & McHen. Rep. 621. *Anderson, ads. Darby*, 1 Nott & McC's Rep. 369. *Brandon ads. Grimke*, *Ibid.* 357. *Ridgely's Lessee vs. Ogles & Al.*, 4 Har. & McHen. Rep. 129. *Barr. vs. Gratz's Heirs*, 4 Wheat. Rep. 223. *Green vs. Luter & Al.* 8 Cranch's Rep. 229.

“Although there may be a concurrent possession, there cannot be a concurrent Seizin of lands: and one only being seized the possession must be adjudged to be in him: because he has the right.” *Langdon vs. Potter & Al.* 3 Mass. Rep. 219. (*Per PARSONS, Ch. J. delivering the Opinion of the Court.*)

“According to Lord HOLT, (1 Salk, 246.) a bare entry on another without an expulsion, makes such a seisin only, that the law will adjudge him in possession that has the right.” *Smith ex dem. Teller & Al. vs. Burtis & Al.* 6 Johns. Rep. 216. (*per KENT, Ch. J. delivering the Opinion of the Court.*) & *vide Codman & Al. vs. Winslow*, 10 Mass. Rep. 151. *Commonwealth vs. Dudley*, *Ibid.* 408. *Doe ex dem. Orbison vs. Morrison*, 1 Hawk's Rep. 469.

“There would appear to be no clearer principle of reason and of justice, than this, that if the rightful owner is in the actual occupancy of a part of his tract, by himself or tenant, he is in the constructive and legal possession, and seisin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law, the possessor by wrong would be more favoured than the rightful possessor. Here are two, each in actual possession and occupation of part of a surveyed tract, the owner and an intruder. Who then is in possession of the part not-occupied by inclosure by either? The man who has no right but by disseisin of a part, or he, who is in the actual occupancy of a part,

not make him tenant in common; for a man cannot disseise another of an undivided moiety, as he may of such a number of acres. But farther, if they had been tenants in common, it is true, that one tenant in common may disseise the other; but that must be an actual disseisin, as the hindering him from coming upon the land, &c. and not by a bare perception of the profits.[ 2 ] As to the objection, that the bringing of the ejectment for a moiety admits him to be out of the possession of it, Holt denied it to be so. For if A. seized of land, makes a lease of

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"and the rightful owner of the whole? In this kind of mixed constructive possession the legal seisin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the title." *Hall & Al. vs. Powell*, 4 Serg. & R. Rep. 465, (per DUNCAN, J. delivering the Opinion of the Court.)

In the case of *Brimmer vs. The Proprietors of Long Wharf*, (5 Pickers. Rep., 131. 134. PUTNAM, J. delivering the Opinion of the Court,) said; "We are all agreed respecting the general principles of law applicable to this action.—The instruction given by the Judge who tried the cause,—that if, in point of fact, the parties had had a mixed possession, and exercised acts of ownership indiscriminately, then there was no such exclusive possession proved by either party as would of itself give a title, that and consequently the issue must be determined according to the legal title,—is correct."

[2] "That one tenant in common may oust his co-tenant and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not we think to be construed into an adverse possession." *McCung vs. Ross*, 5 Wheat. Rep. 124, (per MARSHALL, Ch. J. delivering the Opinion of the Court,) & vide *Cuyler & Al. vs. Bradt & Al.* 2 Caines' Cas. Er. 335.

The fact, that one tenant in common is in possession of the estate, claiming to hold it by a deed covering the whole of it, is sufficient evidence of ouster to support ejectment by a co-tenant. *Clark vs. Vaughan*, 3 Conn. Rep. 191. & vide *Leonard & Al. vs. Leonard*, 10 Muss. Rep. 283.

"The questions, whether the entry of a tenant in common is such as to accrue to the benefit of the others, and whether one has actually ousted another, are questions of fact, involving some-

one undivided moiety, and I. S. ousts the lessee, he must bring his ejectment for a moiety ; so if they were both put out of possession, they must have several remedies, as several assises, &c. Judgment was for the plaintiff.

But the general possession of the lord is not such a possession, either in fact or law, as will avoid the statute of limitations. In (a) ejectment for mines, the plaintiff proved himself lord of the manor, and in possession thereof; but the same witness proving that the defendant had had possession of the mines above twenty years, the court, upon a trial at bar, held this no evidence to avoid the statute of limitations, there being no entry within twenty years upon the mines, which are a distinct possession, and may be different inheritances; and therefore directed the jury to find for the defendants:

[ \*26 ]      \*So if an ejectment (b) be brought by a lord against a cottager, twenty years' possession is a good title; for if the possession of the manor should be a possession of the cottage, the lord would have a better title to that than to any part of his estate; yet a distinction has been taken and allowed by all the judges, on a case reserved by Lord Chief Baron Pengelly, that if a cottage is built in defiance of a lord, and quiet possession has been had of it for twenty years, it is within the statute: But if it were built at first by the lord's permission, or any acknowledgment has been since made, (though it were one hundred years since,) the statute will not run against the lord; for the possession of a tenant at will for ever so many years is

(a) *Stra.* 1141.

(b) *Bull. N. P.* 108.

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"times the intentions and motives of the party in possession; which "it is the province of a jury to determine." *Cummings vs. Wyman*, 10 *Mass. Rep.* 468.

If one of two tenants in Common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it. *Roe ex dem. Truscott vs. Elliot*, 1 *Barn. Ald. Rep.* 85.

no disseisin; there must be a tortious ouster; and it is not to be presumed a country fellow should build in opposition to the lord, unless it be shown, or conveyances are produced.

The lord,<sup>(a)</sup> on the death of a copyholder of inheritance, after three proclamations for the heir to come in and be admitted, seized the estate into his own hands, and afterwards granted it in fee to another: the court considered this absolute seizure as irregular, there being no custom to warrant it, and that it could not afterwards be set up as a seizure *quousque*. In the case stated it appeared that a fine was levied in the court of common pleas, in the thirty-first year of his late majesty's reign, by which it was argued an absolute forfeiture was incurred; and which could not be done away by any subsequent act.

\*Lord Kenyon, Ch. J. in giving his opinion on the [27] case, which was decided on other grounds, observed, with respect to the supposed forfeiture, I do not see why the statute of limitations, which operates as a bar to other rights of entry after twenty years, should not bar the lord in this case. It seems to me, that he should have availed himself of his right of entry within twenty years. However, on this ground, I give no positive opinion.

By Ashhurst, J. with respect to the forfeiture by the fine which was levied in the late reign, it should have been presented at his court as a forfeiture; for the lord was not bound to take advantage of the forfeiture; and here there does appear sufficient on the rolls of the court to show that the lord had waived it.

Buller, J. Besides, there is great weight in my lord's last objection, that at the distance of more than twenty years he could not enter for a forfeiture.

(a) 8 T. R. 172.

Where one holds lands, &c. as lessee, his possession, in contemplation of law, is the possession of the lessor. (a) [1]

(a) 2 Brown, 238.

1 Wils. 176.

8 Wils. 521.

[1] *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 Cow. Rep. 129, 130. *Lessee of Galloway vs. Ogle*, 2 Binney's Rep. 472. *Graham & Al. vs. Moore & Al.* 4 Serg. & R. Rep. 467. *Brandier ex dem. Fitch vs. Marshall*, 1 Caines' Rep. 401. *Jackson ex dem. Webber & Al. vs. Harsen & Al.* 7 Cow. Rep. 323. *Jackson ex dem. Low & Al. vs. Reynolds*, 1 Caines' Rep. 444. & Vide *Jackson ex dem. Bleeker vs. Whitford*, 2 Caines' Rep. 215. *Jackson ex dem. Klein vs. Graham*, 3 Caines' Rep. 188. *Barr vs. Gratz's heirs*, 4 Wheat. Rep. 222, 223.

A tenant, who endeavours to deprive his landlord of the benefit of possession, under a fraudulent pretence of giving it up, is still to be considered a tenant, and cannot defend himself as a stranger, nor prevent by any pretence under such circumstances, his landlord from regaining possession. A person who comes into possession under a tenant, is in no better condition than the tenant himself; and cannot defend his possession against the landlord. *Graham & Al. vs. Moore & Al.* 4. Serg. & R. Rep. 467. 470.

Where A.'s tenant from year to year, takes a lease from B., the act is void; and cannot work an adverse possession against A. *Jackson ex dem. Williams & Al. vs. Miller*, 6 Cow. Rep. 751.

The rule of law, that the tenant cannot contest his landlord's title, is not applicable, where the title of such landlord is a *Connecticut* title, existing in violation of the laws of *Pennsylvania*. Therefore, such tenant, afterwards purchasing a *Pennsylvania* title, and continuing to hold under it, may set it up against his original landlord, who claimed under a *Connecticut* title, though subsequently to such purchase, the landlord also took out another *Pennsylvania* title. *Satterlee & Al. vs. Matthewson*, 13 Serg. & R. Rep. 133.

In the case of *Miller vs. McBrier, in Error*, (14 Serg. & R. Rep. 384, 385.) GIBSON, J. delivering the Opinion of the Court, said, "That a tenant cannot deny his landlord's title is certain; and by an application of this rule to the circumstances of the case, the Court excluded the evidence with which the defendant offered to impeach an original title, with which also the landlord set out. Where a landlord shows no title, but asks to be restored to the possession with which he parted, good faith requires it should be redelivered to him, it being no answer to say he is not the owner of the land. But where, as in this case, he claims on the separate grounds of original title, and as having parted with the possession pursuant to a lease, the defendant will be per-

So the possession of one tenant in common, joint tenant, or parcener, is the possession of his cotenant or coparcener, therefore he in possession must do some act amounting to a denial of the right of his fellow, or omit some duty from which a jury would infer such denial, before his possession can be adverse, and within the statute. [2] But Holt, Ch. J. in *The*

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"mitted to meet him separately on each." & *Vide Camp vs. Camp*, 5 *Qnan. Rep.* 300, 301.

Payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired. *Fenner vs. Duplock & Another*, 2 *Bing. Rep.* 10.

A possession of land taken under an executory contract for the purchase thereof, is in no sense adverse to the person with whom the contract is made. *Jackson ex dem. Swartwout & Uz. vs. Johnson*, 5 *Cow. Rep.* 74. *Jackson ex dem. Young & Al. vs. Camp*, 1 *Cow. Rep.* 610. *Botts & Al. vs. Shields' heirs*, 3 *Litt. Rep.* 34. *Morris vs. Thomas*, 5 *Binn. Rep.* 77. *The Proprietors of Township Number Six, vs. McFarland*, 12 *Mass. Rep.* 325. *Higginbotham & Al. vs. Fiskback*, 1 *Marsh. Rep.* 506. *Wilkinson &c. vs. Nichols*, *Monr. Rep.* 36. *Richardson & Al. vs. Broughton*, 2 *Nott & McCord's Rep.* 417. *Jackson ex dem. Griswold & Al. vs. Bard*, 4 *Johns. Rep.* 230.

[2] *Vide* Page 25, note [2.]

"The Statute does not run in favor of one, against another tenant in common. If, however, there has been an actual ouster & adverse holding, the Statute of Limitations will run from the time of such ouster and adverse possession." *Coleman vs. Hutchenson*, 3 *Bibb's Rep.* 212 (per LOGAN J. delivering the Opinion of the Court.) & *vide* *Brackett vs. Norcross*, 1 *Greenl. Rep.* 91.—*Russell's Lessee vs. Baker*. 1 *Har. & Johns. Rep.* 71. *Doolittle & Uz. vs. Blakesley*, 4 *Day's Rep.* 273.

"The possession of one tenant in common recognizing the title of his co-tenants, is, in legal consideration, the possession of all." *Barrett & Uz. vs. French*, 1 *Conn. Rep.* 364. (per SWIFT, Ch. J., delivering the Opinion of the Court.) & *vide* *Bryans vs. Atwater*, 5 *Day's Rep.* 188.

Where one takes by descent as a co-heir and tenant in common, he cannot shew, (in ejectment by his co-heir, or one claiming under him,) that the ancestor had no title. *Jackson ex dem. Hill vs. Streeter*, 5 *Cow. Rep.* 529.

*Earl of Sussex v. Temple*, (a) is reported to have  
[ \*28 ] said, that as to the possession of one \*tenant in com-  
mon being the possession of the other, that does not

(a) *Ld. Raym.* 312.

"The law is, that nothing but an actual ouster, by one tenant  
"in common, shall give him the exclusive possession. *Fairclain*  
"*ex dem. Empson vs. Shackleton* (5 Burr. 2604.)" *Carothers*  
"*& Al. vs. The Lessee of Dunning & Al.* 3 Serg. & R. Rep.  
385. (Per GIBSON, J.)

One tenant in common cannot maintain ejectment against his  
co-tenant without actual ouster. *Barnitz's Lessee vs. Casey*, 7  
*Cranch's Rep.* 457. & vide *Higbee & Al. vs. Rice*, 5 Mass. Rep.  
351. *Doe ex dem. Gigner vs. Roe*, 2 Taunt. Rep. 397.

"It is true that the mere pernanacy of all the profits by one ten-  
"ant in common, is not an ouster of another tenant in common."  
*Higbee & Al. vs. Rice*, 5 Mass. Rep. 351. (per PARSONS, Ch. J.  
delivering the opinion of the Court.)

"A bare perception of profits will not oust a tenant in common;  
"and for the Statute of Limitations to operate as a bar, the pos-  
"session must be adverse." *Morris' Lessee vs. Van Deren*, 1 Dall.  
Rep. 67. (per McKEAN, Ch. J.) & vide *Lloyd vs. Gordon & Wife*,  
2 Har. & McHen. Rep. 260. *McClung vs. Ross*, 5 Wheat. Rep. 124.

After *nul disseizin* pleaded in a writ of entry, by a tenant in  
common, proof of actual ouster is unnecessary. *Stevens & Ux. vs.*  
*Winship & Ux.* 1 Picker. Rep. 318.

The Statute of Limitations will not run in favour of a purchaser  
for a valuable consideration, who had knowledge of the rights of  
parties, nor where he held as tenant in common, and during the  
minority of the other party. *Saxon & Ux. vs. Barksdale & Al.*  
4 Eq. Rep. (Dessauss,) 522.

A person who has entered by the permission of one tenant in  
common, cannot, a partition having been made, set up an adverse  
possession in bar of an action of ejectment, by the tenant in com-  
mon, to whose share the premises had fallen. *Jackson ex dem.*  
*Fisher vs. Creal & Al.* 13 Johns. Rep. 116.

"It must be conceded that an action for Partition, speaking of  
"it in general terms, can be prescribed against only by a lapse of  
"thirty years, and not even by this or any other much greater  
"length of time when the partners or co-heirs possess in common  
"an inheritance or property." *Gravier & Al. vs. Livingston &*  
*Al.* 6 Mart. Rep. 410. (per MATTHEWS, J. delivering the Opinion  
of the Court.)

hold place against the statute of limitations. And besides, that if one of them only takes the profits, it is an ousting of the other. It is to be observed, however, that the same judge

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Purchasers under the same title, without partition, cannot prescribe against each other, by the lapse of ten years. *Broussard vs. Duhamel*, 3 *Mart. Rep.* (N. S.) 11.

"When property is held by husband and wife, to which one has a right, the legal possession follows the title." *Clark's heirs vs. Barkham's heirs*, 4 *Mart. Rep.* (N. S.) 415, (per PORTER, J. delivering the Opinion of the Court.)

A testator (after directing his debts and some legacies to be paid,) bequeath the residue of his estate to his children, equally to be divided among them; with a proviso, that, if either of his daughters should die without lawful heir, her part should be equally divided among the survivors of his children. One of the daughters took possession of certain slaves in her share, and having married, died, without any child. For more than five years after her death, her husband continued to hold and use the slaves as his own, without any demand being made by the surviving children of the testator. His possession was considered *adverse* to their title; and a purchaser from him was protected by the act of Limitations. *Garland vs. Enos*, 4 *Munf. Rep.* 504.

"The possession of tenants in common is one and undivided, neither can one alone support an action of trespass. The possession of one, therefore, is the possession of all, and if one enters generally, without saying for whom, it will be implied, that he entered according to law; that is to say, for himself and the others. I find a case, in which it was expressly decided, that the entry of one tenant in common, shall enure to the benefit of another, as regards strangers. (*Small vs. Dale*, *Hob.* 120. *Moor*, 868. 14 *Vin.* 512. *P. a. pl.* 1.)" *Carothers & Al. vs. The Lessee of Dunning & Al.* 3 *Serg. & R's. Rep.* 381, (per TILGHMAN, Ch. J.) *Same case*, pages 385, 386, the like opinion by GIBSON, J.

But in the case of *Doolittle & Uz. vs. Blakesley*, (4 *Day's Rep.* 273.) BRAINERD, J. who delivered the Opinion of the Court, said, "In case of tenants in common, as before observed, the possession of one is the possession of the other as it respects themselves. But as it respects strangers it is totally different. One tenant in common, as it respects his fellow tenant, is always safe in the possession of his fellow tenant, unless ousted. But when dispossessed, either by a fellow tenant, or a stranger, he has his remedy in his own right upon his own independent title; and if he will not exercise this right within the 15 years, he must suffer the consequences of an adverse possession, and lose his estate."



held differently in the case of *Reading v. Hausterne*,<sup>(a)</sup> which was decided many years after; for he there said it was true, that one tenant in common might disseise the other; [1] but that must be an actual disseisin, which he explains to be the hindering him from coming upon the land, &c. and not by a bare perception of the profits.

Indeed, the case of *The Earl of Sussex against Temple* has been doubted.<sup>(b)</sup> And, by Lord Hardwicke, Ch.<sup>(c)</sup> it has

(a) Ld. Raym. 830.

(b) Run. Eject. 191.

(c) 2 Atk. 649.

[1] One tenant in common hindering the entry of the other is an ouster. *Gordon vs. Pearson*, 1 Mass. Rep. 323..

If one tenant in common sells the whole tract, and possession be held adversely, for twenty-one years, the sale and possession amount to an ouster of the co-tenant, who is barred by the Act of Limitations. *Culler & Al. vs. Motzer*, 13 Serg. & R. Rep. 356. (In error.) This was an action of debt on bond, brought in the Court of Common Pleas of Perry county, by *Motzer* the defendant in error and plaintiff below, against *Culler* and others, plaintiffs in error and defendants below, and issue was on the plea of payment. The bond was given for the purchase money of a tract of land, conveyed by *Motzer* to *Culler*, with covenants of warranty. The defence was, a defect of title, and an outstanding claim of Dower.

The title originated in an improvement made by *John Brown*, who in 1775 devised one half of it to *Mary Brown*, and the other half to *James Brown*. *Mary Brown* died intestate, leaving two children *William Brown* and *Nancy Brown*, (now *Maxwell*.) *William Brown* thus became entitled to one fourth, and *Nancy* to one fourth, and in 1799, *William Brown*, and one *George Brown*, conveyed to *Martin Motzer*. In 1800, *William Brown* obtained a patent in his own name for the whole tract. In the deed from *George* and *William* to *Motzer*, it was recited, that on the — day of —, 1797, *Nancy Brown* or *Maxwell*, conveyed by deed her interest in the premises to them as tenants in common. *George* and *William* came into the possession of the land before 1799, and it had since continued in their possession, and the possession of those claiming under them. The widow of *George Brown* was still living. On these facts, the plaintiff below contended that the right of *James*, and the claim of *George's* wife to dower, were barred by the Statute of Limitations. The Supreme Court Held, That the right of *James* was barred, but that the claim of *George's* wife to dower was not barred.

been said, that the statute of limitations will not run against one joint tenant or tenant in common, unless an actual ouster is made. And to be sure there ought to be some ouster: but if after such ouster a tenant in common, or joint tenant continue in possession of the whole for twenty years, it is a bar.

On the 17th August, 1721,(a) at a court held for the Forest of Knaresborough, (where lands pass by surrender and admittance,) Jane Shackleton and Patience Readshaw were respectively admitted tenants in fee-simple, each to one undivided moiety of certain lands in the occupation of William Lawson.

17th July, 1723, Emanuel Simpson and Patience his wife, late Readshaw, were admitted on their own surrender, to her moiety; to hold to said Emanuel and [ \*29 ] Patience, their heirs and assigns: 1724 said Patience died; and 20th April, 1728, said Emanuel died; both without issue. 28th May, 1728, Benjamin Empson was admitted to said moiety, in fee-simple, as brother and heir to the said Emanuel.

Hil. 2 Geo. II. (1728-9.) Benjamin Empson obtained judgment by default in ejectment, against William Lawson, in the common pleas; and said Lawson, 10th April, 1729, attorned tenant to Benjamin Empson, and paid him afterwards one year's rent of said moiety.

5th June, 1734, Benjamin Empson died; and 24th July, 1734, Benjamin Empson (an infant of nine years) was admitted to said moiety in fee simple, as nephew and heir to the other Benjamin.

9th August, 1754, this Benjamin Empson died, leaving James the lessor of the plaintiff, his son and heir; an infant of ten years, who, on the 15th of October, 1766, was admitted tenant in fee-simple.

Jane Shackleton died in 1729, leaving the defendant her son and heir; who, being an infant, was admitted to her moiety in fee-simple, 13th August, 1729.

In 1744, William Lawson, by leave of Mr. Shackleton, gave up the farm to his son Christopher, who paid Mr. Shackleton the whole rent then due for the premises, and has paid Mr.

Shackleton the whole rent ever since. And no other [\*30] payment appears than is above stated. A verdict was found for the plaintiff, subject to the opinion of the court on the question—

Whether the plaintiff was barred from recovering by the statute of limitations?

It was argued, that he never was out of possession, that the statute therefore did not bar him; that parceners, joint tenants, and tenants in common, have a joint possession, a joint occupation, joint management of the whole; the possession of one is the possession of both: therefore, the possession of William Shackleton was the possession of James Empson, and he was never actually ousted. Perception of profits does not amount to an expulsion. That one tenant in common may indeed disseise another; but then it must be by actual disseisin, and not by bare perception of profits only; and the statute of limitations never runs against a man, but where he is, actually ousted or disseised; and the cases cited were, *Reading* against *Rawsterne*, 2 Salk. 423. and 2 Lord Raymond, 829. and the case of *Ford* against *Lord Grey*, 6 Mod. 44. 1 Salk. 285. where the first resolution is express, "that the possession of one joint tenant is the possession of the other, so far as to prevent the statute of limitations.

On the other side, it was contended, (a) that there was a difference between joint tenants, and tenants in common. But if

(a) 5 Burr. 2804.

there were not, yet the case of *The Earl of Sussex against Temple*, 1 Ld. Raymond, 310. is contrary to 2 Ld. Raymond, 829. for Holt there says, that as to the possession of one tenant in common being the possession \*of the other, [\*31] that does not hold place against the statute of limitations; and besides, that if one of them only take the profits, it is an ousting of the other: and it was said, that the case of *Storey against Lord Windsor and others*, 2 Atkyns, 632. was in point, since the statute of Queen Anne: that the court could not now attend to an old observation, "that the possession of one is the possession of the other." The possession of one tenant in common is now as adverse as the possession of any other person. And it is a bar after twenty years. Lord Mansfield stopped the reply, and laid it down, that there must be an adverse possession, in order to enable the statute of limitations to run. There must be a disseisin, and a disseisin strictly proved.[1] And he referred to the case of *Taylor, ex dem. Atkins, v. Horde*, Burr. 60. and to Fermor's case. But here is no disseisin: The sole title of the defendant is his admittance, in 1720, to an undivided moiety of the premises. He is so far from a disseisor, that he allows the title of the others.

If there had been a question about ouster, it might have been a fact to be left to a jury. But I am clear that the defendant never meant to disseise the plaintiff, nor thought of it. The tenant was never desired to attorn for the whole; he only attorned for an undivided moiety, and once paid rent for the same. And Shackleton once received rent alone for the whole, without paying any of it over to the other; but this is no actual ouster.[2]

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[1] Vide Page 20, note [2.] Page 21, Note [1.] Page 25, Note [2.] & Page 27, Note [2.]

[2] "A bare perception of profits will not oust a tenant in common." *Morris' Lessee vs. Vanderen*, 1 Dall. Rep. 67. (per McKean, Ch. J.) & Vide *Lloyd vs. Gordon & Wife*, 2 Harr. & Mc-

Mr. Justice Willes and Mr. Justice Blackstone concurred. (Mr. Justice Aston was absent in chancery.) Here is no adverse possession; no keeping the plaintiff out of possession. [ \*32 ] One tenant in common has received the rent, and not accounted for it to the other; but here is no expulsion, no ouster.

On motion for a new trial, in the case (a) *Doe, ex dem. Fisher and Wife, and Taylor and Wife* versus *Prosser*, Lord Mansfield reported the case to be an ejectment brought by the plaintiff for an undivided moiety of certain lands in Enfield, in the county of Middlesex. The lessors of the plaintiff claimed title under Mary Taylor, who was tenant in tail in common of the lands in question, with the sister, under the will of one Perkins. The sister was married to Stevens, after which, in the year 1705, there was a deed of partition, between Mary Taylor and Stevens, for the life of Stevens; by which deed all the lands in Enfield were allotted to him, and under which he enjoyed them till the year 1734, when he died: Mary Taylor died some years before. From the year 1734 one tenant in common, namely, the wife of Stevens, had been in the sole possession of these lands, without any claim or demand by any person or persons claiming under Mary Taylor, deceased, the other tenant in common. No actual ouster was proved; but that Lord Ch. J. Mansfield left it to the jury to say, whether there was not sufficient evidence before them, to presume an actual ouster. And supposing there was an actual ouster, in that case the lessors of the plaintiff were barred by the statute of limitations. The jury found, there was sufficient evidence to presume an actual ouster.

(a) Cowp. 217.

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*Hen. Rep.* 260. *Higbee & Al. vs. Rice*, 5 *Mass. Rep.* 351. *McClung vs. Ross*, 5 *Wheat. Rep.* 124. *Cuyler & Al. vs. Bradt & Al.* 2 *Caines' Cas. Err.* 335.

It was argued, for the plaintiff, that it is a general rule of law, that the possession of one tenant in common is the possession of both; and there is no ground for any distinction in this case so as to take it out of the general rule. If an actual ouster had been proved, it would have been different; but here, no evidence whatsoever is given of any actual ouster, or of a tortious possession; on the contrary, it appears that the possession was only by permission of his companion, and, as a consequence of such permission, he received the rents and profits. But the bare perception of rents and profits is no ouster; and without an actual ouster, the statute of limitations is no bar against a tenant in common; and the cases cited were *Reading against Rawsterne*, 2 Salk. 423. and, 2 Ld. Raymond, 880. and *Empson against Shackleton*, 5 Burt. 2604. [\*33]

For the defendants it was admitted, that where there is no ouster, the statute of limitations does not bar the other tenant in common. But here the jury have found an actual ouster; and the only question is, whether they were warranted in so doing. As to the case of *Empson against Shackleton*, no expulsion or ouster was found in that case; the single question was, whether the plaintiff was barred by the statute of limitations, after a possession of twenty-six years; and the court held he was not. But Lord Mansfield there said, if a question had been made at the trial whether the plaintiff was ousted, it might have been a fact to have been left to a jury. Here the question was made, and the circumstances left to the jury were sufficient, in point of law, for them to presume an actual ouster; namely, an uninterrupted possession and receipt for the rents and profits for forty years. The cases cited were 12 Mod. 658-9., 1 Ld. Raymond, 310.

Lord Mansfield.—It is very true that I told the jury they were warranted by the length of time, in this case, to presume an adverse possession, an ouster, by one of the tenants in common, of his companion; and I [\*34]

continue still of the same opinion. Some ambiguity seems to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. For instance, length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title; but if tenant *pur autre vie* hold over for twenty years after the death of *cœui que vie*, such holding over will, in ejectment, be a complete bar to the remainder-man or reversioner; because it was adverse to his title.

So in the case of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title, [1] and by paying him his share, he acknowledges him cotenant. Nor indeed is a refusal to pay of itself sufficient, without denying his title. But if, upon demand by the cotenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough. [2] The question then is, whether the possession in this case, after the death of Stevens, in the year 1734, that is, after the [ \*35 ] particular estate ended, was a possession as tenant in common, *eo nomine*, or adverse? It is a possession of near forty years, which is more than quadruple the time given by the statute for tenants in common to bring their action of account, if they think proper; namely, six years: But in this case no evidence whatever appears of any account demanded, or of any payment of rents and profits; or of any claim by

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[1] Vide Page 25, Note [2.] & Page 27, Note [2.]

[2] Vide *Jackson ex dem. Bradt & Al. vs. Whitbeck*, 6 Cow. Rep. 633, where this opinion of Lord Mansfield is quoted *verbatim*, and cited as an authority in point.

the lessors of the plaintiff; or of any acknowledgement of the title in them, or in those under whom they would now set up a right. Therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing. [1]

Aston, Justice.—There have been frequent disputes as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an actual ouster of his companion. As to the first, I think it is only where the one holds possession as such, and receives the rents and profits on account of both. With respect to the second, if no actual ouster is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. Now, in this case, there has been a sole and quiet possession for forty years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits, without account for near forty years, is not?

\*Willes, Justice.—This case must be determined [ \*36 ] upon its own circumstances. The possession is a possession of sixteen years above the twenty prescribed by

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[1] In the case of *Jackson ex dem. Bradt & Al. vs. Whitbeck*, (6 Cow. Rep. 533.) SUTHERLAND, J. delivering the Opinion of the Court, said, "It appears to me, that admitting the premises in question to have descended to the children of *Bernardus Bradt*, as tenants in common, the evidence in the case warrants the presumption of an actual ouster of his co-tenants by *Hendrick*. Here has been an exclusive possession under claim of title, for forty years, without any assertion of right, or claim to any portion of the profits of the premises on the part of his co-tenants, although they all resided in the same county, within 40 miles of the premises." & Vide *Van Dyck vs. Van Beuren & Al.* 1 Caines' Rep. 84, to the like effect, & *Bryans vs. Atwater*, 5 Day's Rep. 188. *Brckett vs. Nortcross*, 1 Greenl. Rep. 91.



the statute of limitations, without any claim, demand, or interruption whatsoever: and, therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession. However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster; and therefore entirely agree, that under the circumstances which appeared on the trial, it was very properly left to the jury to presume an actual ouster in this case.

Ashhurst, J. was of the same opinion, and observed, that after so long an acquiescence, the jury were well warranted to presume any thing in favour of the defendant's title; and they might presume either an actual ouster or a conveyance. With respect to the case of *Fairclaim, ex dem. Empson, against Shackleton*, the present question was not properly before the court in that case. The single question there was, whether the plaintiff was barred by the statute of limitations. The possession was a possession of twenty-six years; but in that case it was left to the jury to presume either an adverse possession or actual ouster. And thought, that after a quiet uninterrupted possession for forty years, they were well warranted.

Receipt(a) for rent by a stranger is no evidence of possession, so as to take it out of him in whom the right is, for it [ \*37 ] is no disseisin without the admission of him \*who right has; not even though he make a lease to the tenant by indenture reserving rent, unless he make an actual entry: so, though the tenant declare he is in possession for the stranger; though it may be proper to be left to a jury, especially if the stranger have any colour of title. And though the plaintiff be out of possession, the statute only begins to operate from the time of a right to enter accruing. [ 1 ]

(a) Bull. N. P. 104.

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[1] " It was declared, in *Jackson vs. Schoonmaker*, (4 Johns. Rep. 390.) to be the law, that the Statute of Limitations did not

Ejectment(a) for lands at Deptford; in Kent. The lessor of

(a) Rnn. App. 458.

"affect the right of a remainder-man during the continuance of a particular estate; nor would the acts or laches of the tenant of the particular estate, affect the party entitled in remainder. The right of entry of the lessor did not accrue, and could not exist during the estate by the curtesy." *Jackson ex dem. Beekman vs. Sellick*, 8 Johns. Rep. 269. & Vide *Martin vs. Woods*, 9 Mass. Rep. 377. *Heath & Ux. vs. White*, 5 Conn. Rep. 228. *Doe ex dem. Colclough & Ux. vs. Hulse*, 3 Barn. & Cress. Rep. 757. *Doe ex dem. Milner vs. Brightwen*, 10 East's Rep. 583.

"The statute would work great injustice, if it were held to affect the rights of reversioners or remaindermen during the continuance of the particular estate. Such was the view of the statute taken by this Court, in *Jackson v. Schoonmaker*, (4 John. 390.) and *Jackson, v. Sellick*, (8 Johns. 262.)" *Jackson ex dem. Swartwout & Ux vs. Johnson*, 5 Cow. Rep. 96. (per SUTHERLAND, J. and the like opinion is given by SAVAGE, Ch. J., at pages 102, 103.

If a person has not a right of entry, but only a possibility which may give a right of entry at a future day, the statute does not run against him, until that right accrues. Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor until the death of the tenant in tail without issue. *Lessee of Hall vs. Vandegrift & Al.* 3 Binn. Rep. 374.

In the case of *Stewart vs. Jackson*, (1 Marsh. Rep. (Ky.) 59. on Appeal.) OWSLEY, J. who delivered the Opinion of the Court, said, "The appellee relied upon an adverse possession for twenty years; but as the appellant's right of entry is shewn to have accrued within twenty years, according to the case of *Chiles against Calk*, (4th Bibb, 544,) the Court improperly held his action to be barred by such a possession." & Vide *Finlay & Al. vs. Humble & Al.* 2 Marsh. Rep. (Ky.) 570. *Murray, Admr. &c. vs. The East India Company*, 5 Barn. & Ald. Rep. 204.

"The principle on which the Act of Limitations operates, is, that there must be a right of entry existing at the time of the bar, which can be affected; and when the person who is supposed to be affected, and those under whom he holds, had no right of entry, that right is not tolled." *May's heirs vs. Hill*, 5 Litt. Rep. 313. (per MILLS, J. delivering the Opinion of the Court.)

In the case of *Wells vs. Prince*, (9 Mass. Rep. 506.) the COURT said; "That those in remainder might have entered immediately on the refusal of the devisee for life to accept the devise, is true,

the plaintiff claimed the estate, as heir at law of John Walthew and Edmund Walthew, who had granted long leases of the premises in question. John Walthew, together with Edmund Walthew, (nephew to John,) were seised in fee, as parceners in gavelkind of the lands in question; and, on 11th June, 1678, leased the premises to John Hall for seventy-one years, at 6l. 10s. rent; and on 22d April, 1692, again leased the premises to Ann Hall, who had succeeded the original lessee, for forty years, to commence from 1749, at the same rent. The lease was traced down by several assignments to the 4th March, 1742, when it was assigned by the then assignee of the lease, to one Robert Tew, from whom the ancestors of Mr. Maddox had obtained possession. These leases expired 11th June, 1789, on which one Elizabeth Ellerbeck had entered, in the name of herself and the lessor of the plaintiff; and Mr. Maddox, the defendant, had brought an ejectment, claiming not only under the assignment of Tew, but also under a conveyance of the reversion by lease and release from the heirs of Dame Elizabeth Blundell, who, he stated, was the heir of John and Edmund [ \*38 ] \*Walthew. Elizabeth Ellerbeck having no evidence, called no witnesses; and Maddox recovered the premises on a trial before Gould, J. at Maidstone, Lent, 1791. Mrs.

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“ But one may have different rights of entry; and although the devisee for life refuses to accept the estate devised, and the remainderman thereby acquires an immediate right of entry, yet he is not obliged to avail himself of his right so accruing; but he may enter after his second right accrues by the death of the tenant for life.” & *Vide Wallingford vs. Hearl*, 15 *Mass. Rep.* 472. *Same Point.*

The right of entry on land accrues only with the emanation of the grant, and then the statute commences running. *Fowke vs. Darnall*, 5 *Litt. Rep.* 318.

Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered and kept the possession for more than twenty years. On his death C. brought ejectment: Held, that the action was barred by the Statute of Limitations, for that C.'s right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe ex dem. Foster & Al. vs. Scott*, 4 *Barn. & Cress. Rep.* 706.

Ellerbeck, being thrown into gaol for the costs, died there, and the present lessor of the plaintiff, her sister, having obtained friends, made an entry, and brought the present ejectment, which came on to be tried before Hotham, B. at Maidstone, Lent Assizes, 1794. The lessor of the plaintiff, having given evidence of the above leases, proved a descent by parish registers and Fleet marriages, from Elizabeth Walthew, (of Kidbrooke, a hamlet in Deptford parish,) and by the baptism of the said Elizabeth it appeared she was daughter of Mr. Walthew; and it was shown, that Henry Walthew, of Deptford, was eldest brother of John Walthew, and uncle of Edmund Walthew, the lessors of the two original leases; and that Henry Walthew, having lived at Deptford, was insisted to be the father of the said Elizabeth, of Kidbrooke.

For defendant it was objected, that supposing the pedigree sufficiently proved, as there was a rent of 6*l.* 10*s.* reserved on the two original leases, the lessor of the plaintiff must show that she herself, or some of the several ancestors from whom she derived her title and descent from Elizabeth, of Kidbrooke, had received that rent, within twenty years previous to the commencement of the action. And Hotham, B. thinking that was necessary to prove a possessory title, the rent being in lieu of the land, thought the objection was fatal, and upon it nonsuited the plaintiff.

Easter term, 1794, K. B. it was moved by Bond, Serjeant, to set aside the nonsuit. He said, it was a \*general question, whether a person seised of a re- [\*39] version, expectant on a term for years, is bound, in order to entitle himself to recover in ejectment, to show, as part of his case, that he has actually been possessed, within any particular limits, of the rents reserved upon the leases. He said, it would be admitted, if nothing was reserved, he could not be expected to show any thing was received. But as fealty was at least the implied service in all tenancies, if no rent, the party must show he had received fealty; or if a pep-

per-corn was only reserved, he must prove seisin of it. He said, nothing of this was to be found in the statute of limitations, which alone could have given birth to the supposed rule. That 21 Jac. I. c. 16. s. 1. only directed that the entry must be made within twenty years after the title accrued. And as ejectment only lay where the title of entry was found, the ejectment only could be brought within twenty years. That here the leases expired in June, 1789, consequently, the ejectment being brought within twenty years after the title accrued, the statute was satisfied. He concluded, that all reference or analogy to this statute was false, and there was no rule of law which authorized the defendant's objection. He said, if the rent had not been received, the same statute had taken away the remedy by action of debt, after six years, but not the right. The right remained to the rent; and, according to Sir W. Foster, in 8 Co. 64. the older statute of limitations did not apply to rent reserved by deed. S. P. 2 Vern. 235. The proof of payment was not a requisite or direct point to be prepared to prove in this action; he don't undertake to make out he is entitled to the rent; he only is to show he is entitled to the possession, the term being elapsed. In real actions, sometimes esplees are part of demandant's case, as in a writ of right; but in others, as in *cessavit*, or escheat, where they claim a seignior, or reversion, none are alleged. Bro. Espl. 5. several special verdicts in ejectment may be looked at, where plaintiff's whole proof set out, not necessary to show seisin of rent reserved, where reversioner claimed after a long lease rendering rent. Salk. 339. he said he was nonsuited. That, probably, on the whole case it might have appeared that the plaintiffs were not entitled; and non-receipt of rent in that line of descent plaintiffs claimed, might operate as a consideration or presumption for the jury to go on, and lead them to suppose the right was not in the plaintiffs; but if defendant had shown this, the plaintiffs might have rebutted such a presumption, by evidence in reply; and that, at all events, not receiving the rent was only a question for the jury, and could not warrant a nonsuit; as if it was as necessary a requisite as

proof of a conversion in trover, or of esplees in a writ of right.

The court set aside the nonsuit; Lord Kenyon going very much on Bond's argument.

The cause was tried before Lord Kenyon, Sum. 1794, when defendants had a verdict, on the defect of plaintiff's pedigree, and a fair conclusion, from all the circumstances, that Dame Elizabeth Blundell, under whom Maddox claimed, was heir of the Walthews, and not Elizabeth, of Kidbrooke.

Nor does it bring the case within the statute, that the lease contained a covenant for re-entry for non-payment of rent, as the lessor was not obliged to enter for condition \*broken: or that the premises were copyhold, and the [ \*41 ] defendant had been admitted as heir at law to his father, who had been admitted as heir at law to him last seised, and had received the rent during the continuance of the original lease; for as a descent cast only tolls an entry where an entry can lawfully be made, so the statute only bars an entry where such entry was lawful; and to avoid the statute, the law will not require a man to be a trespasser.[1]

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[1] Vide page 37, note [1.]

In the case of *Jackson ex dem. Swartwout & Uz. vs. Jackson*, (5 Cow. Rep. 103.) SAVAGE, Ch. J. said; "At what period of time, I would ask, was it in the power of the heirs of Mrs. Cooper to have asserted their rights, before 1817, when Thomas Cooper [he was tenant by the curtesy.] died? Their infancy, I admit, is no excuse for them, as successive disabilities are not allowed. The statute was not operative until the death of Mrs. Cooper. It is true, indeed, that more than twenty years have elapsed since the adverse possession commenced; and more than ten years since the last disability was removed, which existed when the disseisin took place; but I would ask, when were the claimants guilty of laches? They were not bound to make an entry, or claim, till the death of Mrs. Cooper. And from that period, till the death of the tenant for life, the law would not permit them to enter. Shall laches, then, be imputed to them? Certainly not. Whether

• In ejectment<sup>(a)</sup> for a house and premises, a verdict was found for the plaintiff, subject to the opinion of the court on a special case; in which it appeared that the premises in question were parcel of the manor of Stebunheath otherwise Stepney, in Middlesex. At a court holden for the manor, on the 12th April, 1743, Thomazine Taylor, spinster, was admitted to the premises, by the description of, &c. &c. according, &c. At the same court, the said Thomazine Taylor, according to the custom of the manor, surrendered, amongst others, the premises in question, to such uses, intents, and purposes, as the said Thomazine Taylor, in or by her last will or testament in writing, should limit, appoint, or declare. Thomazine Taylor, by indenture of lease of the 7th of June, 1759, by virtue of a previous license from the lord, demised the premises in question to Dorothy Whiting, since deceased, for forty-one years from Midsummer-day then next, at the rent of eight pounds per annum, payable quarterly on the usual rent days; with a proviso, that if the rent should be unpaid for twenty-one days, &c. or if all defects of reparations from time to time, &c. were not amended within three months next after notice in [ \*42 ] writing, &c. or if the said Dorothy Whiting, her executors, &c. did not well and truly keep all the covenants, &c. on her and their parts, &c. that then and from thenceforth, and at all times afterwards, it should and might be lawful for the said Thomazine Taylor, her heirs, &c. into and upon the said demised premises, to re-enter, and repossess. The lessee took possession of the premises under this lease; and she and her representative, Mr. John Scott Whiting, (the present tenant in possession,) continued to occupy them from the commence-

(a) 7 East, 299.

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• "Golden Cooper was born before or after the disseisin seems to me not to change the rights of the parties. The lessors of the plaintiff have brought their action within ten years after the operation of the statute upon their claim, and are not barred by it." & vide *Ibid.* 95, 96.; (*same Case.*) for a similar Opinion by BURTONLAND; J.

ment of the lease until the expiration of it at Midsummer, 1800. On the 3d of August, 1780, Miss Thomazine Taylor, the lessor, gave directions to her attorney to prepare her will; by which she gave to certain persons the premises in question, in trust for Elizabeth Cook (who was therein named Mary Cook) and her heirs for ever; but the jury found that the lessor of the plaintiff was the person intended by that description. Before any will was made under these instructions, Miss Thomazine Taylor died. These instructions were, upon the 25th of February, 1782, pronounced for, and established as, the only will of Miss Thomazine Taylor, by the prerogative court, and probate thereof was afterwards granted accordingly. Upon the 21st June, 1782, Thomas Danvers, father to the present defendant, was admitted as heir at law to the premises in question, in the accustomed form.

The rent was paid to Thomas Danvers from the time of Miss Thomazine Taylor's death, until his own death in January, 1791; and from that time till the expiration of the lease, to his son James Danvers, the defendant, who, upon his father's death, was admitted, 3d May, 1791, to the premises as his heir at law, in the same form \*as his father was [ \*43 ] admitted. And, upon the expiration of the lease, made a new demise to Mrs. Whiting, under which the latter held, and paid rent as tenant to the defendant, at the time of the demises laid in the declaration. The lessor of the plaintiff Elizabeth was admitted to the premises upon the 1st of December, 1801. Her marriage with the other lessor was proved at the trial: and it was also proved that the testatrix had no other relative of the name of Cook, except the lessor of the plaintiff Elizabeth, and that she was the person who was intended to take by the name of Mary Cook, as described in the instructions of the 3d of August, 1780. The question for the opinion of the court was, whether the lessors of the plaintiff were, under the above circumstances, entitled to recover.



The lessor of the plaintiff Elizabeth Cook, claimed the premises in question under the will of Thomazine Taylor, by the description of copyhold; to which premises Thomazine had been before admitted, by the description of all that customary tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod, according to the custom, &c. and had before surrendered by the description of customary lands, &c. holden by copy of court-roll, to such uses as she, by her last will and testament in writing, should appoint. But though the testatrix died in August, 1780, and the will was established in February, 1782, yet, owing to an outstanding lease granted by the testatrix in her life-time, which did not expire till June, 1800, the devisee did not enter, or bring ejectment, till Hilary term, 1802, but suffered the heir at law of the testatrix, who was admitted to the premises in 1782, and afterwards the defendant, [\*44] his son, \*to whom they descended in 1791, to take the rent during the intermediate time; and this although there was a proviso in the lease for re-entry, in the case of non-payment of rent.

Upon these facts four objections were taken; the first and second were on the construction of the statute of frauds; the third was, that the lessor's right of entry was either tolled by the descent cast on the defendant, or, fourthly, it was barred by the statute of limitations; and that either, first, by the non-receipt of rent under the lease granted by the testatrix for more than twenty years since her death; and the defendant and his father having, during all that time, had an adverse enjoyment of such rent, and of the premises: or, secondly, by the lessor Elizabeth not having availed herself for more than twenty years of her right of entry under the proviso in the lease for non-payment of rent, or otherwise.

It was argued for the defendant, that considering the estate as copyhold, the admittance "was the investiture of the tenant, and no attornment is necessary;" and a copyholder having a right or title to admittance, which vests in him the whole seisin,

is barred if he do not claim to be admitted within twenty years. Here, however, it was the stronger, because the defendant and his father, heirs at law of the testatrix, had an adverse possession, by admission, and by the receipt of the rents and profits for above twenty years since the lessor's title accrued. For an heir is in by descent, and may bring ejectment before admittance, though a devisee or surrenderee cannot; and on admittance upon descent, the heir is tenant immediately from the death of his ancestor.

\*2dly. Taking the premises to be freehold, the lessor [ \*45 ] of the plaintiff was also barred by his laches; and it was no answer to say, that the outstanding lease, which continued to run till Midsummer, 1800, prevented his entry before; for it was still competent in him to have entered, without committing a trespass; as to demand rent, or fealty, or to obtain seisin of the freehold. [Mr. Justice Lawrence.—Must not an entry, to avoid the statute of limitations, be an entry for the purpose of taking possession? and how could the lessor have lawfully entered for that purpose during the continuance of the lease?] If this were so, a right of entry might be preserved even *after* an ouster of the rents and profits, for above sixty or a thousand years; which would entirely defeat the object of the statute, which was to quiet men's possessions: and it would be incongruous to hold, that an ejectment might be maintained after a real action was barred by length of time; and that such an effect should be produced by a tenancy from year to year, or even a tenancy at will.

*Taylor* against *Horde*,<sup>(a)</sup> was cited, to prove that a tenant in possession enjoys as the covenanted bailiff of the tenant of the freehold: and as a recovery of a term does not displace the freehold, so, according to Co. Litt. s. 411. there may be a disseisin of the freehold, pending a term, which shall be no ouster of a term. But *Taylor* against *Horde* shows that a mere entry on the land for another purpose, does not operate as a dissei-

(a) 1 Burr. 118.

sin of the tenant in possession, so as to make a good tenant to the *præcipe*.

[ \*46 ]      \* [Lord Ellenborough, Ch. J.—Disseisin is said to be a personal trespass, a tortious ouster of the seisin of another. And in *Salk.* 246. Lord Holt says, there can be no disseisin without an actual expulsion.[1] But can you show that the devisee could have entered to vest the seisin in herself without committing a trespass upon the tenant in possession? because the law does not require a person to do that which would make him a wrongdoer.][2]

She might have had a writ of entry during the continuance of the lease, for the purpose of asserting and establishing her right.

Ouster of seisin is distinct from ouster of possession. Receipt of rent by a stranger is a *disseisin* ;(a) and yet there is no ouster of possession. And, at any rate, there might have been a symbolical delivery of customary lands in lease by admittance, subject to the lease. Besides, the devisee might have brought a real action, wherein the judgment is *ut haberet seisinam*, &c. without saying any thing of the possession : and there the demandant counts upon his seisin, and not upon possession, as in ejectment. And if the fact of the lands being in lease do not bar the seisin of the owner, there is no reason why it should not bar his entry for the purpose of giving him seisin.

The devisee might have justified in trespass brought by the tenant, that she entered in order to vest the seisin in herself, or to assert her right, whatever it might be, against the [ \*47 ] party claiming and taking the rent, and not to oust

(a) At the election of the party. *Cro. Car.* 303.

[1] Vide page 20, note [1.]

[2] Vide page 41, note [1.]

the tenant. She might also have entered to distrain for the rent. And, at all events, as there was a clause in the lease for re-entry in default of payment of the rent, the devisee might have availed herself of the forfeiture to enter and keep possession above twenty years ago.

The statute of limitations has always been construed favourably with a view to quiet possession. And the question, whether the receipt of rent by one tenant in common for above twenty years, were an ouster of his companion could never have occurred, if an adverse receipt of rent for such a length of time had not been considered as a bar.

Now here the defendant, and his father before him, have had an adverse possession by the receipt of the rent for above twenty years, which is not only a bar to the lessor's remedy, by ejectment, but gives the defendant a title to the possession, from whence he can only be removed by a real action: and that this distinguished the case from *Orrel against Maddox, Ruan*. Eject. 458. where the only question was, whether it was necessary for the lessor of the plaintiff to show a receipt of rent within twenty years, on an outstanding lease, which was holden not to be necessary.

For the plaintiff it was answered, that a descent could only toll an entry where an entry might lawfully have been made; but the devisee had no right of entry pending the lease granted by testatrix, which did not expire till 1660; and the law will never compel a person to be guilty of a trespass in order to acquire a right. No other [\*48] right or title of entry is within the statute of limitations, except that which is accompanied by a right of possession, which the lessor could not have pending the lease. And the payment of the rent during part of the time to the defendant and his father, would not of itself, make the holding of the tenant wrongful, but it still continued legal under the original term, as the lessor was not bound to take advantage of the for-

feiture, and re-enter for the condition broken. Besides, the devisee claiming under the will was not bound to enter till the will was established, which was not till 1782, between which time and the bringing of the ejectment, there was not an adverse possession of twenty years.

Lord Ellenborough, Ch. J. afterwards, in delivering the opinion of the court, observed, that much ingenuity had been exercised upon questions about which the court had no doubt: amongst which was the fourth, as to whether the lessor of the plaintiff's right of entry were not barred by the statute of limitations; there having been an adverse enjoyment of the rent for a longer time than twenty years. And supposing the circumstances of the estate having been during all that time enjoyed by a tenant under a lease granted by the testatrix, and which expired only in 1800; the defendant in that case contended, that by not paying rent the tenant had committed a forfeiture more than twenty years ago; which gave the lessor of the plaintiff a right to enter; and not having done so within twenty years, she was on that account also barred. To these several objections, his lordship observed, that it would not be necessary to go into them at any length, as satisfactory [\*49] answers had been given in the several arguments.

The objections do not apply to cases where the party has no remedy but by entry. The estate having been in the hands of a tenant till 1800, holding under a lease granted by the testatrix, is a sufficient answer; for during that lease the lessor could not enter to support an ejectment: and if a forfeiture had been committed, she was not obliged to enter for the forfeiture.[1]

We have seen that the statute does not run but where there is an adverse possession; [2] and that if the owner have a pos-

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[1] Vide page 37, note [1.]

[2] "For the Statute of Limitations to operate as a bar, the possession must be adverse." *Morris' Lessee vs. Van Doren*, 1 Dall. Rep. 67. (per McKean, Ch. J.) & vide page 19, note [1.]

session either in fact or in contemplation of law, or if he be out of possession, and have no right to enter during a particular estate, but for condition broken, of which, in law, he was not bound to avail himself; in this case it never attaches. There are also other circumstances which prevent its operation; and also, certain acts of the party to be benefited by the statute, which, after it has begun to run, sets all at large again.

As to what prevents the operation of the statute, it has been holden, that the payment of interest on a mortgage will prevent the statute from running against the mortgagee, although he may not have been in possession of the lands for more than twenty years.

William Denne,<sup>(a)</sup> possessed of a term for a thousand years, assigned to Ralph Philpot for a collateral security against a bond in which Philpot was bound jointly with Denne for the debt of Denne, in 1655. Philpot died, leaving R. Philpot, his son, his executor. William Denne died, leaving Katharine Denne, his wife, his \*executrix, and Katharine Denne, his daughter, his heir. In 1674, R. Philpot, executor of Ralph Philpot, and Katharine Denne, the executrix of William Denne, and Katharine Denne, the heiress of William Denne, assigned this term of a thousand years to John Harrison, with condition that, upon payment of 200*l.*, the consideration of the said assignment, by Katharine Denne, the executrix, &c. Katharine Denne received the profits till 1691, and she paid the interest to the same time. And, per Holt, Ch. J. if a man makes a mortgage for collateral security, although the mortgagee is not in possession for twenty years and more, yet, if the interest be paid upon the bond, according to the agreement of the parties, it shall not be barred by the statute of limitations.

Which, with the preceding cases cited, establishes this construction; that where the act of the defendant acknowledges a

(a) *Ld. Raym.* 740.

right in the owner, the statute will not operate; because such acknowledgment deduced from circumstances, negatives the idea of adverse possession.[1]

So, where the tenant for more than twenty years, and after the expiration of a lease, remains in possession, and omits to pay the rent, but allows the lessor to receive tithes, according to a covenant contained in the lease; such allowance whilst it continues is an acknowledgment of the lessor's right, and prevents the operation of the statute.

In ejectment(a) for lands in the parish of Beddington. The

(a) 2 Bos. & Pull 541.

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[1] If a defendant has acknowledged the title of the plaintiff, he cannot afterwards dispute it. *Jackson ex dem. Low. & Al. vs. Reynolds*, 1 Caines' Rep. 444. & vide *Jackson ex dem. Viety & Clark vs. Querden*, 2 Johns. Cas. 383. *Doe ex dem. Human vs. Pettett*, 5 Barn. & Ald. Rep. 223. *Lessee of Galloway vs. Ogle*, 2 Binn. Rep. 472. *Graham & Al. vs. Moore & Al.* 4 Serg. & R. Rep. 467. *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 Cow. Rep. 129, 130. *Jackson ex dem. Griswold, & Al. vs. Hard*, 4 Johns. Rep. 230. *Brandter ex dem. Fitch & Al. vs. Marshall*, 1 Caines' Rep. 391. *Rouletts vs. Daniel*, 4 Munf. Rep. 473. *Jackson ex dem. Russell & Al. vs. Croy*, 12 Johns. Rep. 430. *Duvall & Al. vs. Bibb*, 3 Call's Rep. 366. *Jackson ex dem. Dox vs. Jackson*, 5 Cow. Rep. 174. *Higginson vs. Mein*, 4 Cranch Rep. 419. *Hall vs. Doe ex dem. Surtees & Al.* 5 Barn. & Ald. Rep. 687.

In the case of *Jackson ex dem. Swartwout & Ux. vs. Cole*, (4 Cowens' Rep. 587. 593.) SUTHERLAND, J., delivering the Opinion of the Court, said, (after suggesting the presumption that the trustee had been reimbursed his advances and conveyed to the *cestuy que trust*.) "This presumption derives confirmation from the fact, as testified to by *Morse*, that many portions of the land of *David Colden*, mentioned in the location and appraisement, had been held for upwards of thirty years under his heirs; and also from the circumstance, that the Defendant himself, as early as 1798, took a conveyance of the premises in question from one of the daughters of *David Colden*, and the husbands of two others. Indeed, it may be questionable whether this is not such a recognition of the legal title of the heirs as to preclude the defendant from denying that it passed from the trustee to the *cestuy que trust*."

lessors of the plaintiff, who were lords of the manor of Beddington, sought to recover these lands, as parcel of \*the manor; and the defendant, who was rector of [\*51] the parish of Beddington, disputed their title, claiming them as parcel of the rectorial glebe. The lords of the manor of Beddington had the right of presentation to the rectory, and were also entitled to a portion of the tithes. At various times, there had been a mutual interchange of lands and tithes between the lords of the manor and the rector; which had given rise to much confusion concerning their respective rights. To prove possession in the lessors of the plaintiff a deed was produced, dated on the 18th of November, 1703, by which the then lords of the manor demised to one Richard Reddall, parson of Beddington, the lands in question (among others) for forty years, "yielding and paying therefore yearly during the said term, the sum of forty-three shillings and four pence; and also paying and delivering yearly during the said term, at the barn door, in the yard of the mansion house, all the tithe straw, both of wheat and rye, coming and growing within the parish of Beddington, and also seven quarters of wheat, four quarters of rye, and thirty quarters of barley. The deed then went on, "and the said Richard Reddall, for himself, his executors, &c. doth covenant, promise, and grant, to and with the said Sir I. I., &c. (the lords of the manor,) their heirs, &c. that he the said Richard Reddall shall not only well and truly pay, or cause to be paid, from time to time, and at all times, during the continuance of this present demise, unto the said Sir I. I., &c. their heirs, &c. the said yearly rent of forty-three shillings and four pence at the said mansion house, but also shall and will deliver the said tithe straw, together with the said wheat, rye, and barley, in such manner and form as the same shall grow due and payable by virtue of these presents; and further, the said \*Richard Reddall doth grant unto the said Sir I. I., &c. [\*52] their heirs, &c. that they shall have and enjoy all the tithe oats hereafter to be arising or growing within the said parish of Beddington, to be yearly taken by the said Sir I. I., &c. their heirs, &c. during the said term; (except the tithes of the



glebe lands and portionary hereby demised, while it is in the said parson's own occupation;) provided always, that if the said yearly rent of forty-three shillings and four pence, or any part thereof, shall be behind and unpaid by the space of one and twenty days next after any of the said feast days on which the same ought to be paid as aforesaid, being lawfully demanded, or if the said corn or straw above mentioned be not well and truly delivered in manner and form aforesaid, within fourteen days next after request thereof made as aforesaid, or if the said Sir I. I., &c. their heirs, &c. shall be molested or troubled by the said Richard Reddall, or his assigns, in taking or enjoying the said tithe oats by these presents mentioned to be granted as aforesaid, that then and from thenceforth it shall and may be lawful for the said Sir I. I., &c. their heirs, &c. into the said demised premises, with all and singular their appurtenances, to re-enter, and the same to have again as in their former estate." At the conclusion of the deed there was a covenant by the lords of the manor, that "the said Richard Reddall and his assigns shall quietly and peaceably enjoy the said demised premises, paying the yearly rent, and under the covenants, grants, and agreements before in these presents contained, without any lawful let or interruption of them the said Sir I. I., &c. their heirs, &c. during the said term."

[ \*53 ]      \*To rebut this evidence, and show an adverse possession, the defendant read an answer to a bill in equity, of a late date, filed by himself against the lessors of the plaintiff, for an account of the tithe of oats which he then claimed, in which, though they did not mention the deed of 1703, yet they referred to a similar lease, of a much older date, and stated, that such leases had from time to time been granted to the rectors by the lords of the manor; and that about 1753, upon some dispute between Sir N. H. Carew, the then lord of the manor, and the Reverend John Pryse, then incumbent of the living of Beddington, the latter taking advantage of the former being a man of an indolent temper, and inattentive to business, withheld the rents reserved on the lands in question, but per-

mitted him to continue to take the tithe of oats. Upon the above part of the answer being read in evidence by the defendant, the counsel for the plaintiff also read the following sentence from the same answer: "That the lessors of the plaintiff had heard as truth, that the said John Pryse did pay or deliver to the said Sir N. H. Carew divers quantities of corn and straw; and that the said Sir N. H. Carew did receive the tithe of oats within the said parish;" which corn and straw, he insisted, was delivered by way of render, and the tithe of oats received in consideration of the demise, and on the footing of the several agreements contained in the several leases. No rent appeared to have been paid by the rectors of Beddington to the lords of the manor since the year 1753; but the latter continued to take the tithe of oats until a decree made in favour of the rector, in consequence of the above mentioned bill in equity. The present defendant was instituted to the living of Beddington in the year 1782; and \*it was not till after that period [\*54] that the lease of 1703, which had been lost, was discovered.

Lord Alvanley, Ch. J. If the rules of law will permit me to do otherwise, I shall be very sorry to give any countenance to the defence which has been resorted to in the present case.— And the more so, because the two parties, in ascertaining their respective rights, meet upon very unequal terms; the one, as the representative of the church, being barred by no lapse of time in the claim of any dormant rights, whereas the other has to encounter the difficulties opposed to him by the statute of limitations. It is not disputed that the premises in question were demised to the rectors of Beddington by the predecessors of the present lessors of the plaintiffs, reserving to themselves certain rents, and also the tithe of oats within the parish. Since the year 1753, the rectors have ceased to pay the rents reserved in the lease, but the Carew family have continued to receive the tithe. Possibly, therefore, at the time at which the rents were withheld, it was agreed between the then rector and the representative of the Carew family, that if the latter were per-

mitted to receive the tithe as before, the former should be permitted to retain the land demised. Considering, therefore, that this is a question to be submitted to a jury, and understanding from the learned judge who tried the cause, that whatever was contested at the trial was submitted by him to the jury, I am of opinion that the present verdict ought not to be disturbed.

Heath, J. The doctrine of remitter furnishes a strong analogy in favour of the present lessors of the plaintiffs ;  
 [\*55] \*for the rule is, that a man who is in by a puisne estate, shall be remitted without any act of his own, but by a mere operation of law in his eigne estate. Now that rule seems to me very applicable to the present case ; for it is clear that the Carew family continued to receive the tithe of oats, and therefore should, as it appears to me, be held to have received them in that right which they acquired under the demise by which they granted the premises in question. Besides, it is to be recollected, that this question arises upon the statute of limitations, which always receives a strict construction from the courts.[1]

Rooke, J. It is clear that the Carew family and the Rectors of Beddington agreed to create the relation of landlord and tenant between themselves by the lease of 1703 ; and up to the present time, the one has continued to receive the tithe, and the other to hold the land. The present rector attempts to avail himself of a rule of law highly favourable to the church, by which he may, without any limitation of time, reclaim the tithe granted as a consideration for the enjoyment of the land in question by his predecessor, and yet prevent the Carew family from reclaiming their land by setting up the statute of limitations in bar of their demand. This is so unjust, that I shall be glad to find out any ground upon which we may be enabled

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[1] "Every Statute of Limitations, being in restraint of right, must be construed strictly." *Pease vs. Howard*, 14 Johns. Rep. 479. (*per VAN NESS, J. delivering the Opinion of the Court.*)

to defeat his attempt. Now it does appear to me, that the former rectors of the parish may be presumed to have intended to do justice, and therefore to have permitted the Carew family to receive the tithe of oats by way of compensation for the land which they continued to hold. If so, the present rector not having succeeded to the living till 1782, the possession of the premises in question was not adverse up to that period, and since that period twenty years have not elapsed.

\*Upon the whole, therefore, I think there ought not to [ \*56 ] be a new trial.

Chambre, J. Upon this question I have entertained considerable doubts ; nor, indeed, is my mind altogether free from doubts at the present moment. Those doubts do not respect the justice of the case, for that is most clearly with the lessors of the plaintiff. I am not, indeed, altogether without suspicion, that the contract entered into between the rectors of Beddington and the Carew family originated in simony ; the latter reserving to themselves much more than they were entitled to, under the name of a compensation for the manor-house and lands. But however that may be ; it will not affect the present question. If this case were to be again submitted to a jury, I think they might fairly conclude, that in 1753, the then rector of Beddington quarrelled with the terms of his lease, and though he refused to continue the stipulated renders to the Carew family, yet permitted them to receive the tithe of oats. Possibly, at the trial, the question was not put to the jury quite so fully as it might have been, but reserved rather too much as a dry point of law. Indeed, could I be convinced that the jury had considered and decided the precise question, my doubts would be removed. Certainly, in the litigation of their respective rights, these parties contend on very unequal terms ; the rector availing himself of a maxim in law in favour of the church, to which the Carew family, as laymen, cannot resort. The point, however, which, in this case, has most embarrassed my mind, is the degree of positive truth drawn from the answer in chancery of the lessors of the plaintiff in their own favour. It is true

that it was introduced into the cause by the defendant, on \*whose behalf some parts of the answer were read. But in those parts on which the lessors of the plaintiff relied, they speak only to what they "have heard as truth." I think that was not admissible evidence; for it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer; and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only, in the course of the answer to a bill filed for a discovery. This point does not, indeed, appear to have been contested at the trial. Had it been contested, I should have thought the court bound to send the case down to a new trial. Upon the whole, however, I am disposed to concur with my lord, and my brothers, that there ought not to be a new trial in this case.

As to what act of the party to be benefited by the statute takes the case out of the statute. It was ruled, per Holt, Ch. J. at Maidstone, Lent. Assises, 13 Wm. III. in an ejectment (a) brought by the executor of Harrison, that he was not barred by the statute of limitations, because the statute did not prejudice at the time of the assignment, there being but nineteen years elapsed; and then the joining of him in the assignment, who had the title to take advantage of the statute, gives a new title.

Also, it has been ruled, (b) that a claim or entry, to prevent the statute of limitations, must be upon the land, unless there be some special reason to the contrary. [1]

(a) *Ld. Raym.* 740. (b) 6 *Mod.* 44. *Doug.* 435. *Bull. N. P.* 102.

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[1] "If a man hath title to enter into any lands or tenements, if he dares not enter into the same lands or tenements, nor into any parcell thereof for doubt of beating, or for doubt of mayming, or for doubt of death, if he goeth and approach as neere to the tene-

\*And by the 4 & 5 Anne, c. 16. upon such claim [\*58] or entry, an action must be commenced within one year next after the making of such entry and claim, and prosecuted with effect, otherwise of no force to avoid the statute.[1]

"ments as hee dare for such doubt, and by word claime the lands  
"to bee his, presently by such claim he bath a possession and seisin  
"in the lands, as well as if he had entred in deed, although hee  
"never had possession or seisin of the same lands or tenements  
"before the said claime. " *Litt. Sect.* 419. & vide *Green vs. Lister*  
& *Al. 8 Cranch. Rep.* 425, 426.

"Here is to be observed, that there be two manner of entries,  
"viz. an entry in deed and an entry in law. An entry in deed is  
"sufficiently knowne. An entry in law is when such claime is made  
"as is here expressed, which entry in law is as strong and as forcible  
"in law as an entry in deed, and that as well where the lands  
"are in the hands of one by title as by wrong. And therefore  
"upon such an entry in law, an assise doth lie, as well as upon an  
"entry in deed, and such an entry in law shall avoid a warranty,  
"&c." *Co. Litt.* [253. b.]

"And living within the view of the land will, under circumstances, give the feoffee a seizin in deed as effectually as an actual entry. There are, therefore, cases in which the law gives the party a constructive seizin in deed. They are founded upon this plain reason, that either the claim is made sufficiently notorious by an actual entry into part, of which the vicinage can take notice, or the party has done all that, under the circumstances of the case he was bound to do. *Lex non cogit ad vana aut impossibilia*. The same is the result of conveyances deriving their effect under the Statute of Uses; for there, without actual entry or livery of seizin, the bargainee has a complete seizin in deed. "*Com. Dig. Uses*, [B. 1.] *Cro. Eliz.* 46. 1 *Cruise Dig.* 12. "*Shep. Touch.* 223, &c. *Harg. Co. Litt.* 271, [b.] note, [231.]" *Green vs. Lister* & *Al. 8 Cranch's Rep.* 247. (per STORY, J. delivering the Opinion of the Court.)

[1] The same provision is contained in the Statute of the State of New-York, *Chap.* 183. *Sect.* 3. (1 R. L. 185.) entitled "*An Act for the Limitation of Criminal Prosecutions, and of actions at Law.*" passed 8th April, 1801.

*Of the Proviso contained in the second Section.*

THIS statute provides,<sup>(a)</sup> that if any person entitled to a writ of formedon, or having a right to enter, be, at the time of such right or title first descended, within age, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, such person and his heirs may, notwithstanding the twenty years be expired, bring his action, or make his entry, as he might before, so that he sue forth the same within ten years after the disability removed, or the death of him having the right.[1]

(a) 2d Section.

[1] The 3d section of the Statute of Limitations of the state of New-York (1 R. L. 185, 186.) provides, " That if any person " entitled to any such writ of *Scire Facias*, or to make such entry, be at the time such right or title first descended or accrued " within the age of twenty-one years, *feme covert*, insane or imprisoned, such person and his heirs, shall or may after the said " twenty years be expired, bring such action or make such " entry as he or they might have done before the expiration of " the said twenty years, so as such person within ten years after " such disability removed, or the heir or heirs of such person within ten years after his death, sue forth such writ or make such entry, and at no time after ten years as aforesaid."

The Limitation Act of 1814 [*Kentucky*] operates on conveyances made by non-residents made to residents *before the passage of the act*, so as to take away the ten years allowed by the act of 1796, to commence suit after return to the state. *Luckett vs. Dunn & Al.* 3 Litt. Rep. 218.

In the case of *Pancoast's Lessee vs. Addison*, (1 Har. & Johns. Rep. 350. 356.) it was Held, That a non-resident of the state, [*Maryland*] but who is a resident of one of the *United States*, is not barred by the Statute of Limitations in an action of ejectment. And CHASE, Ch. J. said, " The Statute of Limitations with the " savings is a beneficial law for the purpose of quieting possessions, &c. but without the savings it would be a rigorous and " unjust law. It does not extend to persons out of the state who

It is to be observed, that the statute of limitations only runs in bar of the action or right therein mentioned; but if the plaintiff

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“who cannot be supposed to know the law.” & *Vide Brent's Lessee vs. Trasker*, 1 *Harr. & McHen. Rep.* 89.

The terms “beyond seas,” in the proviso or saving clause of a Statute of Limitations are equivalent to *without the limits of the state* where the statute is enacted; and the party who is without those limits is entitled to the benefit of the exception. *Murray's Lessee vs. Baker & Al.* 3 *Wheat. Rep.* 541. *Shelly & Al. Ex'ors. vs. Guy*, 11 *Wheat. Rep.* 361. *Pancoast's Lessee vs. Addison*, 1 *Harr. & Johns. Rep.* 350.

*Contra, Ward vs. Hallam*, 2 *Dall. Rep.* 217.

“It being a clear principle of law, that a possessor cannot avail himself of prescription against minors.” *Calvit vs. Innis*, 10 *Mart. Rep.* 289. (*per MATHEWS, J. delivering the Opinion of the Court.*) & *Vide, Gayoso De Lemos vs. Garcia*, 1 *Mart. Rep. (N. S.)* 324.

A person who was a minor at the time of the death of his ancestor, has five years after he comes of age to bring his action for the recovery of his lands. *Rochell ads. Holmes*, 2 *Bay's Rep.* 487. & *Vide Saxon & Ux. vs. Barksdale & Al.* 4 *Eq. Rep. (Dessauss)* 522. 528. *Den ex dem. Park vs. Cochran & Al.* 1 *Hayw. Rep.* 170.

A *feme covert* is allowed 7 years after discovery to sue for lands. *Gore & Al. vs. Marshall & Al.* 3 *Marsh. Rep. (Ky.)* 319.

Prescription does not run against the wife in favour of the purchasers of her property, although separated. *Prudhomme vs. Dawson & Al.* 3 *Mart. Rep. (N. S.)* 161.

In the case of *Lamar vs. Jones & Al.* (3 *Harr. & McHen. Rep.* 328. 332. *on Appeal*,) the bill stated that complainant's father mortgaged the premises, &c. on the 1st of October, 1756, subject to a clause of redemption on the 1st of October, 1757, and continued in possession till his death in 1759, leaving a widow, and complainant his only child. After the death of complainant's father the mortgagee took possession of the premises, and on the 28th March, 1760, the Heir of the mortgagee sold the land to the ancestor of the defendants, for £100. That the complainant on the 7th of November, 1783, paid the mortgagee's agent the principal and interest due on the said mortgaged premises, and which were released to him. That the complainant tendered to the defendants the sum of £150; that the defendants have made considerable profits from the land, &c.

The defendants in their answer set up the length of time in bar to the complainant's claim and right of redemption. It appeared



have a right of a higher nature, if he can maintain a writ of right

from testimony that the complainant was about twelve years old when his father died.

The Chancellor, HANSON, on the 9th of March, 1791, decreed that the complainant was not entitled to the relief prayed by his bill, and dismissed the same, assigning as his reasons, that "the time limited by law for making an entry into lands, held under an adverse title having with great propriety been adopted by the court of Chancery in *England*, for barring the redemption of lands held peaceably under a mortgage, after the day of payment; and the said limitation having already been adopted by this Court, and the time within which an entry may be made on lands held by an adverse title, being either twenty years after the right accrued, or ten years after the arrival at full age, in case the right accrued to the person claiming during his infancy; and the Chancellor being of Opinion, that inasmuch as the Legislature of this State did not think proper to suspend, during the late war, the operation of the Acts of Limitation with respect to a right of entry, (as it did in other cases,) this Court ought not, by allowing a suspension, to introduce a variance between the rules of law and the rules of equity, which have so often, by Chancellors in *England*, been declared the same with respect to the limitation of suits; and the Chancellor being further of Opinion, that even if a suspension be allowed by this court, it could not be allowed for more than four years, it being well known that during the war there was no obstruction to the prosecution of suits in this Court for more than the said number of years, since the possession of the mortgagee, and almost twenty years since the arrival at full age of the complainant had elapsed before the filing of this bill. It is therefore, this 9th day of March, 1791, by the Chancellor and the authority of this Court, adjudged, &c. that the complainant is not entitled to the relief prayed by his bill, and that the said bill be dismissed, but without costs."

But this cause being carried up by Appeal, the Court of Appeals, in June, 1793, gave the following Opinion:

"It is laid down as a rule, that mortgages are held not to be within the Statute of Limitations; but it was thought reasonable to establish a period at which, *prima facie*, the right of redemption shall be presumed to be deserted by the mortgagor, unless he be capable of producing circumstances to account for his neglect; and Chancery having adopted a variety of those circumstances, to wit, fraud, acknowledgment, infancy, ignorance, lawsuits, &c. of most of which the parties cannot avail themselves at Common Law, there is certainly a deviation in such cases from its strictness.

for the same lands into which he could have entered but for the

“ No case has been cited to show that Courts of Chancery have adopted that part of the clause of the statute of 21 Jac. I. which allows infants the liberty, after the twenty years are expired, to bring actions within ten years after their coming to full age; and the Judges, after diligent search, not being able to find any, although from the year 1624, in which the statute was made, to the year 1793, many cases, in all probability, have happened; an inference may be drawn from thence that a doctrine prevailed, that when adverse possession was taken from the infant, limitations did not run on him until his full age, and that this doctrine is not impeached in the *dictum* of Lord Talbot, in *Belch & Harvey*, as it is not an adjudged case; but, on the contrary, there are adjudged cases where infancy, lawsuits and other circumstances, have excused the party, and where an infant being plaintiff, adverse possession was taken of him six years before he came of age, and that period being accounted for by infancy, although twelve years had elapsed after his coming of age before bill filed; yet as it did not amount to twenty years, he had a right to bring his bill, and the party here being similarly circumstanced, being six years an infant, and bringing his bill in time, if the six years be not accounted as part of the time. We do, therefore order and adjudge that the Decree of the Chancellor be reversed, and that the appellant have liberty to proceed before him on the bill, and that he hear the cause upon the merits, according to the course of that Court.” & *Vide Trustees of Lexington vs. Lindsay's heirs*, 2 Marsh. (Ky.) Rep. 445. *Higginson, Survivor, &c. vs. Air & Al* 1 Eq. Rep. (Desauss.) 427.

“ There is no doubt, that a party has, in every event, twenty years to make an entry; and if under disability when the right or title of entry first accrued, then such person may, notwithstanding twenty years have expired, bring an action or make an entry, within ten years after the disability is removed. *Jackson ex dem. Corson & Al. vs. Cairns & Al.* 20 Johns. Rep. 306. (per SPENCER, Ch. J. delivering the Opinion of the Court.) & *Vide Jackson ex dem. Swartwout & Uz. vs. Johnson*, 5 Cow. Rep. 94. 101. 105. *Demarest & Uz. vs. Wynkoop & Al.* 3 Johns. Ch. Rep. 137.

But in the case of *Pender vs. Jones*, (2 Hayw. Rep. 294.) TAYLOR, J. said; “ I am of opinion, that if seven years be completed at a period of time, occurring after arrival at full age, when part of the seven years elapsed during infancy, that the party has three years from his arrival to age to make his entry or claim, and no more.

An estate devised to executors, or such of them as shall qualify, is a contingent executory devise, and does not vest until that

statute, he may do so notwithstanding; so that he prosecute such right within (a) sixty years of the seisin of his ancestor: [2] for a bar (b) is of the particular action, or of any of the same nature or degree only, and not of any action of a higher nature; which makes this difference between the statute of limitations and the statute of fines; under the latter, a fine duly levied, and non-claim, bars every right; but the former, in many cases, bars only a specific remedy.

[\*60] \*When the statute begins to run, no subsequent disability stops it; [1] therefore, if the person, at the

(a) 32 H. III.

(b) Co. Litt. 308.

event occurs; until then, the title descends to the heirs. And where, in such case, after the testator's death, but before the qualification of the executors, and whilst his heirs were infants, an entry was made on part of their land under a junior patent; it was *Held*, that the Statute of Limitations did not commence running, until the qualification of the executors, or one of them. *May's heirs vs. Hill*, 5 Litt. Rep. 308.

"With regard to executory devises, whether certain or contingent, it is one of their properties that they cannot be aliened or barred by any mode of conveyance, whether by recovery, fine, or other act. Therefore executory devises preserve the estate from injuries, against the particular estate, and thus create a kind of perpetuity, on which courts have placed sundry restrictions. *May's heirs vs. Hill*, 5 Litt. Rep. 312, 313. (per MILLS, J. delivering the Opinion of the Court.)

[2] The 2nd section of the Statute of Limitations of the State of New-York, limits all real actions to twenty-five years, whether brought on the demandant's own seisin or possession, or that of his ancestor or predecessor; "Provided always, That no part of the time during which the plaintiff or person making avowry or cognizance shall have been within the age of twenty-one years, insane, *feme covert* or imprisoned, shall be taken as a part of the said limitation of twenty-five years." (1 R. L. 185.)

[1] "The general rule is, that when the Statute of Limitations once begins to run, it continues to run, notwithstanding any subsequent disability." *Peck vs. Randall's Trustees*, 1 Johns. Rep. 176 (per KENT, Ch. J. delivering the Opinion of the Court.) & vide to the same point, *Crozier vs. Gano & Uz*, 1 Bibb's

time of the accruing of the right, could have made his entry, or

*Rep.* 261. *Fewell & Uz. vs. Collins*, 1 *Constit. Rep. So. Car.* 202. *Den ex dem. Andrews vs. Mulford*, 1 *Hayw. Rep.* 321, 322. *Anon.* 1 *Hayw. Rep.* 416. *Fitzhugh vs. Anderson & Al.* 2 *Hen. & Munf. Rep.* 289. *Mooers vs. White & Al.* 6 *Johns. Ch. Rep.* 372. *Dow. vs. Warren*, 6 *Mass. Rep.* 328. *Hudson vs. Hudson's Admr. & Al.* 6 *Munf. Rep.* 352. *Den ex dem. Pearce & Al. vs. House*, 3 *Nor. Car. Law Repy.* 305. *Lessee of Hall vs. Vandegrift*, 3 *Binn. Rep.* 374. *Faysoux vs. Prather*, 1 *Nott & McCord, Rep.* 296. *Craddock's Lessee vs. Stalcup*, 1 *Tenn. Rep.* 353. *Walden vs. the Heirs of Gratz*, 1 *Wheat. Rep.* 296. *Lessee of Neilly vs. McCormick*, 2 *Yeates' Rep.* 448. *Cotterell vs. Dutton*, 4 *Taunt. Rep.* 830. *Wells vs. Newbolt, Cam. & Norw. Rep.* 407.—*Rogers vs. Hillhouse*, 3 *Conn. Rep.* 398. *Adamson Admr. &c. vs. Smith*, 2 *Rep. Const. c. So. Car.* 269. *Langford's Admr. vs. Gentry*, 4 *Bibb's Rep.* 468. *Doe ex dem. Pritchard & Al. vs. Lawyer*, 1 *Hawk's Rep.* 337. *Jones Admr. &c. vs. Brodie Admr. &c.* 3 *Murph. Rep.* 594.

The same construction given to the Statute of Fines. *Gooright ex dem. Fowler & Al. vs. Forester & Al.* 1 *Taunt. Rep.* 578. 614.

"It is an established rule, that when the Statute begins to run, "it continues to run without interruption, from the death of the "claimant." *Beauchamp, Admr. &c. vs. Mudd*, 2 *Bibb's Rep.* 538. (*per BOYLE, Ch. J. delivering the Opinion of the Court.*)

But under the Statute of Limitations of Kentucky, the saving whereof is in favor of those who were or shall be infants, &c. "at the time when the said right or title accrued or coming to "them;" It was *Held*, That if the Statute begins to run against the ancestor, but by his death the land descends to his heirs, who are infants, the Statute does not run on, but the infants shall have the time allowed by the Statute after arriving at full age, to bring their action. *Machir, &c. vs. May &c.* 4 *Bibb's Rep.* 44. & *vide Floyd's heirs vs. Johnson & Al.* 2 *Litt. Rep.* 114. *May's heirs vs. Bennett*, 4 *Litt. Rep.* 314. *McIntire's heirs vs. Funk's heirs*, 5 *Litt. Rep.* 35.

The infancy of one tenant in common will not prevent the Statute of Limitations from running against a co-tenant. *Thomas vs. Machir, &c.* 4 *Bibb's Rep.* 412.

Coparceners whose right of entry is barred by the Statute of Limitations, cannot recover in ejectment by joining with them one whose right is saved; each, or any number being capable of vindicating his or their own right without joining the others. *Sanford & Uz. & Al. vs. Button*, 4 *Day's Rep.* 310.

brought his action, though he should be immediately after impri-

Where the right of one tenant in common is protected by her coverture, the right of the other, who is under no disability, is not thereby saved. *Doolittle & Uz. vs. Blakesley*, 4 *Day's Rep.* 265. *Bryan & Al. vs. Hinman*, 5 *Day's Rep.* 211. *McIntire's heirs vs. Funk's heirs*, 5 *Litt. Rep.* 34, 35.

If one of the persons against whom a decree is given, be an infant, his infancy will prevent the Statute of Limitations from barring those who must necessarily join with such infant in a Writ of Error to reverse such decree. *Kennedy's heirs vs. Duncan, &c.* 1 *Hardin's Rep.* 365. & vide *May's heirs vs. Bennett*, 4 *Litt. Rep.* 314.

In the case of joint rights, all the complainants must labor under some legal disability, provided for by the Statute, to prevent the acts operating as a bar. *Smith, &c. vs. Carney & Al.* 1 *Litt. Rep.* 297.

In a joint estate to several persons, if the right of entry is toll-ed as to some, all are barred; but it is otherwise if it be "an estate in severalty, or in common." *Dickey vs. Armstrong's heirs*, 1 *Marsh. Rep. (Ky.)* 39, 40. *Robertson, &c. vs. Smith's heirs*, *Litt. select. cas.* 296. *Robert's heirs vs. Ridgeway*, *Ibid.* 394. & vide *Turner & Al. Exors. vs. Debell Exor.* 2 *Marsh. Rep. (Ky.)* 384. *Simpson & Al. vs. Shannon's heirs*, 3 *Marsh. Rep. (Ky.)* 462. *Marsteller & Al. vs. McClean*, 7 *Cranch. Rep.* 156.

In the case of *Roe ex dem. Langdon & Al. vs. Rowston*, (2 *Taunt. Rep.* 446.) MANSFIELD, Ch. J. delivering the Opinion of the Court, said; "In this case were two demises, and a verdict passed "for the plaintiff on the second demise by *Elizabeth Langdon*, "the fact being, that the estate descended to *Elizabeth Langdon*, "a feme covert, and *Mary Peart*, in parcenary, and that 20 years "elapsed without *Mary Peart's* entering. And the only ques-tion was, whether the lessor of the plaintiff was not entitled to "judgment on the first Count, on the idea that as *Elizabeth Lang-don* was under a disability at the time of the descent cast, that "circumstance was to operate in favor of the other coparcener. "Upon the hearing of the argument, we were, and are now, of "opinion, that the entry of *Elizabeth Langdon* cannot give a "right of entry to *Barrett*, [he was the son and heir of *Mary Peart*, "then deceased,] whose right was before barred by the Statute of "Limitations; but that the judgment must be for the lessor of the "plaintiff for the moiety only."

Under the act of Kentucky, of 1797, taken in connexion with preceding acts, declaring that entries for land shall become void, if not surveyed before the first day of October, 1798, with a pro-

soned; or if, when the right accrued, he were under any disability, which was removed, and shortly he should fall under some other, the right of action or entry is not saved to him.

In *Doe, (a) on the demise of Count Duroure*, against *James*, it appeared on the special verdict, that in Trinity term, 1775, a fine sur *conusance de droit come ceo, &c.* was levied of lands between C. Langlois, plaintiff, and the defendant, *deforciant*; and the last proclamation of that fine was in Easter term, 1776. The lessor of the plaintiff, when the fine was levied and proclaimed,

(a) 4 T. R. 301.

viso allowing to infants and *femes covert* three years after their several disabilities are removed to complete surveys on their entries; it was *Held*, that if any one or more of the joint owners be under the disability of infancy or coverture, it brings the entry within the savings of the proviso as to all the other owners. Distinction between this Statute and a Statute of Limitations of personal actions. *Shipp. & Al. vs. Miller's heirs*, 2 *Wheat. Rep.* 317. *Kennedy & Al. vs. Bruce*, 2 *Bibb's Rep.* 371.

And where B., who owned a certificate of such entry, assigned his claim to H., an adult, and B. died within the time for surveying entries; *Held* that neither B. nor his heirs being responsible for the title, after the assignment to H., the infancy of B's heirs did not save the entry from forfeiture for not being surveyed in time. *Hart's heirs, &c. vs. Benton's heirs, &c.* 3 *Bibb's Rep.* 420.

The 5th Section of the Limitation act of 26th March, 1785, [*Pennsylvania*] is binding on infants where there has been no possession of lands improved for seven years next before action brought. *Lessee of Mobley & Al. vs. Oeker*, 3 *Yeates' Rep.* 200.

A party claiming the benefit of the *proviso* in the Statute of Limitations, can only avail himself of a *disability existing* when his right of action first accrued. *Jackson ex dem. Roosevelt & Al. vs. Wheat*, 18 *Johns. Rep.* 40. *Kendal vs. Slaughter*, 1 *Marsh. Rep. (Ky.)* 377.

Neither the act of 1800 [*North Carolina*] repealing the laws granting escheated lands to the University, nor bringing a suit by the escheator under the act of 1801, suspends the Statute of Limitations as to the trustees whose right was sought to be divested by those acts. *Den ex dem. Trustees of the University vs. Campbell*, 1 *Murph. Rep.* 185.

was an infant, but attained the age of twenty-one on the 26th of February, 1784: he was then at large in England, and continued so to be until the 17th of December, 1784, when he was arrested, and imprisoned for debt; and was kept and detained in prison continually from that time until the 16th of September, 1789; and on the 17th day of that month, he, claiming title to the premises in question, made an actual and personal entry thereon, in due form of law to avoid the fine, and ejected the defendant, &c.

In argument for the plaintiff, a passage was cited from *Shep. Touch.* 30. from whence it should seem that the party is not bound by the fine, unless he have five entire years to make his claim free from any of the disabilities mentioned in the act, except where such disability is incurred by his own voluntary act; for, speaking of \*absence out of England, it says, that if a party be in England at the time of the fine levied, and after go beyond seas, and suffer the five years after the proclamation to pass, in this case he shall have no longer time, except he be sent in the king's service, and by his commandment; which, it was argued, seems to mark a distinction between voluntary and involuntary disabilities; and supposes, that in the latter instance, the fine would not continue to run, although the party was in England when it first began to have its operation. Now imprisonment must be considered as equally involuntary with the case there put; and is so considered in *Plowden*, 366. where it is said, that taking husband, or going beyond the seas, are voluntary acts; but insanity of mind, and imprisonment, are against the will of the party: then, what ought to be the construction of the court so as best to answer the intention of the legislature? In introducing those exceptions, they certainly intended that the parties labouring under the disabilities mentioned, should have the full benefit of the indulgence given them. Every reason which operated for the exception in the first instance, is equally urgent as to any subsequent disability. This act was intended to allow all such persons five years clear from any of the disabilities mentioned.

the words imply as much; and as the act was restrictive of the right which such persons had before, it ought to be construed literally and strictly.

Lord Kenyon, Ch. J. The two questions which have been raised in this case are certainly of great importance; though, in my opinion, of no difficulty. It is of importance that it should be known who are deemed natural-born subjects, on account of the various rights to which \*they are entitled. [ \*62 ] It is also important to know how far the operation of the statute of fines extends, not only as it affects questions arising on that particular act, but, also, as it involves in it questions arising on a very beneficial system of statutes, the statutes of limitations: for if we were to suffer any innovation on the established construction of fines, it might also endanger the uniform construction of the other statutes of limitations, which are of the greatest importance, inasmuch as they are statutes of repose. But from the time when I first read this case, down to the present moment. I have not seen any fair reason to doubt on either of these points.

His lordship having disposed of the first question, continued—But on the other question, which is of infinitely greater importance, inasmuch as it respects an infinitely greater number of cases, it is not fit that we should be silent, lest our silence should be deemed an acquiescence in the plaintiff's argument. I confess, I never heard it doubted till the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion, on the words of the statute of fines, on the uniform construction of all the statutes of limitations down to the present moment, and on the general received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine, and make nice distinctions between the cases of voluntary and involuntary



disabilities ; but in both cases, when the disability is once removed, the time begins to run.

[ \*63 ]      \*Ashurst, J. I also concur with my lord. Our decision is warranted by the uniform construction which has been put upon this statute ; and a contrary determination would be productive of all those mischievous consequences which the different statutes of limitations intended to prevent. If the disability be once removed, the time must continue to run, notwithstanding any subsequent disability, either voluntary or involuntary ; and even if there were any distinction between the two kinds of disability, the present is against the plaintiff ; for the imprisonment for debt was in consequence of his own voluntary act.

Grose, J. agreed.

Mr. Justice Buller was sitting for the Lord Chancellor.

In *Doe, on the demise of (a) Griggs and another, v. Shane*, at the trial before Gould, J. the defendant set up a fine in order to bar the plaintiff's title. It appeared in evidence, that the person under whom the lessors of the plaintiff claimed, and to bar whom the fine was set up, was of sane mind when the fine was levied, but that he became insane about two years afterwards ; and the question was, whether the time continued to run against him while he was in that state ? for, if it did not, the lessors of the plaintiff had made their entry in time. A verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit, in case the court should be of opinion that the party was barred. Erskine was to have shown cause against the rule for entering the nonsuit ; but he said, that the current of authorities, on looking into them, was so strong against him, [ \*64 ] that he would not pretend to argue the question. That though Brown and Saunders had said, in *Plowd. 366.* that in such a case the fine would not run, yet that all the au-

thorities were the other way; and so was the determination even in that case in Plowd. The court said he was right in giving up the point, for that it was too plain to be disputed; and they made the rule absolute. [1]

But if a man both of non-sane memory, and out of the kingdom, comes into the kingdom, and then goes out of the kingdom, his non-sane memory continuing, it was said by Hard-

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[1] In the case of *Crozier vs. Gano & Uz*, (1 Bibb's Rep. 260,) TRIMBLE, J. delivering the Opinion of the Court, said; "The evident design of the replication is to shew that the plaintiff, Keziab, from the time her cause of action first accrued, has at all times (until within five years next before the commencement of the suit,) labored under the disabilities of either infancy, coverture, or absence from the country, so as to bring her within the savings of the Statute of Limitations. If the replication had really shewn this, it would have been good; for although one of them, as infancy, for example, had been removed, yet if another of them occurred, as marriage, before the removal of that of infancy, and so on in succession, so that all were not removed at any one time, whereby the statute could attach and begin to run, it would have been a sufficient answer to the plea:—[of the Statute of Limitations,] this the replication has not done."—& vide *Eaton vs. Sanford*, 2 Day's Rep. 523.

In the case of *Cotterell vs. Dutton*, (4 Taunt. Rep. 830,) CHAMBRE, J. said, "The ten years do not run at all while there is a continuance of disabilities, but they run without intermission from the time that the disabilities first cease."

But in the case of *Bunce & Al. vs. Wolcott*, (2 Conn. Rep. 27,) it was Held, That the saving of the Statute of Limitations regarding the right of entry into lands, (tit. 97. c. 3.) applies only to such disability as existed at the time the right of entry accrued, and not to any supervenient disability. & vide *Thompson & Al. vs. Smith*, 7 Serg. & R. Rep. 209.

"It is equally well settled that cumulative disabilities cannot be allowed." *Jackson ex dem. Swartwout & Uz. vs. Johnson*, 5 Cow. Rep. 101. (per SAVAGE, Ch. J.) & vide Opinions of SUTHERLAND, J. & WOODWORTH, J. to the same point, pages 95 & 105, (same case.)

An infant has 4 years after coming of age, to commence an action of trover; but cannot connect the disability of infancy with that of coverture, to gain a longer time. *Fewel & Uz. vs. Collins*, 1 Constit. Rep. So. Car. 202.

wicke, Lord Chan.(a) that his privilege, as to being out of the kingdom, is gone ; and his privilege, as to non-sane, will begin from the time he returns to his senses.[2]

The word "death," in this section, refers to the death of the person to whom the right first accrued ; therefore, where ancestor died seised, leaving a son and daughter infants, and a stran-

(a) 2 Atk. 632.

[2] "It is perfectly well settled, that if several disabilities exist "when the right of action accrues, the Statute does not begin to run, till the party has survived them all. (3 Johns. Ch. Rep. 138. 1 Plowd. 375.)" *Jackson ex dem. Swartwout & Uz. vs. Johnson*, 5 Cow. Rep. 101. (per SAVAGE, Ch. J.) & vide *Opinions of WOODWORTH, J. page 105, & Opinion of SUTHERLAND, J. page 94, (same point.)*

"A person may be under several of the disabilities specified, "at the time the title accrues ; and in such case, the person so situated may avail him or herself of either ; and it will always be a sufficient answer to an objector to such an election, to say, the "disability on which I rely is pointed out by the proviso ; it existed at the time my right or title accrued ; I have prosecuted my claim within the time allowed after its discontinuance, and "come within both the letter and spirit of the law." *Bunce & Al. vs. Wolcott*, 2 Conn. Rep. 34 ; (per EDMOND, J.)

If a non-resident comes into the state temporarily, and returns to his dwelling without the state, the Statute of Limitations begins to run against him. *Doe ex dem. Smith vs. Harrow, &c.* 3 Bibb's Rep. 446. *May's heirs vs. Slaughter*, 3 Marsh. Rep. (Ky.) 506. 507. In this last cited case the Court said, (BOYLE, Ch. J. delivering the Opinion ; ) "We have no doubt, assuming "the facts as true, that the Statute commenced running against "John May in his life time. At the separation of this State from "Virginia, we made the Statute of that State ours, by adoption, "and in its turns [terms] it then applied to the limits of this State, "which were the former limits of the district, and its expressions "were retrospective, as to all previous as well as subsequent entries upon land, so that by the separation of the two States, the "effect of the Statute did not cease. John May having been in "the limits of the district, after the adverse entry and possession "of the appellee, the Statute attached and took effect against "him, altho' his residence was not within the district, as was decided by this Court in the case of *Smith vs. Hanon*. [*Harrow*,] "3 Bibb 440." [446.]

ger entered, and the son went to sea, and was supposed to have died abroad, the daughter was not allowed twenty years to enter from the death of her brother, but only ten.[3]

Ejectment(a) for a house and a small parcel of land, tried before Rooke, J. at the Summer Assises, 1805, at Northampton; and the principal question was, whether the action was brought in time within the second clause of exceptions in the statute of limitations, 21 Jac. I. c. 16.? The person last seised of the premises, from whom the lessors of the plaintiff claimed, was

(a) 6 East, 80.

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[3] There is no saving in the Statute of Limitations, for any disability in the heir supervenient to the disability of the person to whom the right of entry first accrued. *Griswold vs. Buller & Uz*, 3 Conn. Rep. 227. (per BRISTOL, CHAPMAN & BRAINARD, Js. *Contra*, HOSMER, Ch. J. & PETERS, J.)

Where an adverse possession has commenced in the lifetime of the ancestor, the operation of the Statute of Limitations is not prevented by the title descending to a person under legal disability, as a *feme covert*, &c. *Jackson ex dem. Livingston & Al. vs. Robins*, 15 Johns. Rep. 169.

Where an adverse possession begins to run in the lifetime of the ancestor, and the land descends to an infant heir, the latter is not protected by his disability. *Jackson ex dem. Colden & Al. vs. Moore*, 13 Johns. Rep. 513.

“We have not forgotten that it has been decided by this Court, “that under our Statute, if a right of action accrues to one laboring under no disability, and by his death the right descends upon his heir, who does labor under some disability, the right of the latter will be saved until ten years after such disability is removed; but we have never decided that one disability can be added to another.” &c. “When, therefore, a right of action has once accrued, or come to a person labouring under a disability, and that disability is removed, or the person so disabled has died, it is obvious, that the Statute has provided for no other or successive disability; and to permit such disability to cumulate and save the right, would be adding to the Statute, and giving to it an operation contrary to its import.” *Floyd’s heirs vs. Johnson & Al.* 2 Litt. Rep. 114. (per CURIAM.)

one Thomas Jesson, on whose death in the year 1777, [ \*65 ] David, his \*elder brother, took possession of them, and transmitted the possession to the defendant, his grandson. Thomas Jesson left a son John, and a daughter Frances, him surviving. John was baptized in 1767; and after the death of his father, being then about ten years of age, was put out apprentice to the sea service by the parish, and was seen by a witness on his return from his first voyage, about a year after the father's death: soon after which he went to sea again, and had not been heard of since, and was believed to be dead. Frances, the daughter, one of the lessors of the plaintiff, was baptized on the 21st of May, 1771, and afterwards married George, the other lessor.

It was contended at the trial, by the defendant's counsel, that the ejectment was out of time; for it was uncertain when John, the son of Thomas, the ancestor last seised, died; and that the twenty years given by the statute began to run immediately on the death of Thomas in 1777, and consequently expired in 1797; or that, if the statute favoured Frances the daughter till ten years after the disability of her infancy was removed, at any rate, as she was of full age in 1792, she ought to have brought her ejectment in 1802; and consequently this ejectment, brought in 1804, was too late.

On the other hand, it was contended by the plaintiff's counsel, that supposing John to have died abroad, the presumption of his death could not arise till seven years after he was last seen in England previous to his going to sea, which could not be till 1785 or 1786, till when the right of entry of the lessor Frances did not accrue; and that she had twenty [ \*66 ] years in which to bring her ejectment \*after that time; the statute having never begun to run by reason of the continuing disability, and consequently that this action was well brought.

The learned judge left it to the jury to say when and where

John died; and observed, that it was fair to presume he had not died in England, as none of his family ever heard of his death. And as to the time, that it was incumbent on the jury to find the fact as well as they could under the doubt and difficulty of the case; that, at any time beyond the first seven years, they might fairly presume him dead; but the not hearing of him within that period was hardly sufficient to afford such a presumption. The jury found a verdict for the plaintiff, and that John died abroad about the years 1785, 1786, or 1787, but not before.

In Michaelmas term, 45 Geo. III. it was moved to set aside the verdict, and grant a new trial, on the ground that Frances, the daughter, was at most entitled to ten years for bringing her ejectment after she came of age, which was in 1792, even if she were not bound to have made her entry within ten years from the death of her brother, from whom she claimed.

In showing cause it was urged, the title of the lessor of the plaintiff Frances, did not accrue until the death of her brother, which the jury found was not before 1785; and the first clause of the statute of limitations gives every person twenty years to make their entry after their title first accrued. The second clause was evidently intended to extend, and not to limit, the time of entry allowed by the first; because in the particular cases, it \*allows ten years, notwithstanding [\*67] the said twenty years be expired. The meaning, therefore, was to allow every person at least twenty years after their title accrued, if there were a continuing disability from the death of the ancestor last seised, and ten years more to the heir of the person dying under a disability; which ten years are in addition to the twenty years allowed by the first clause. Where, indeed, the bar once begins to run, it may be presumed, in analogy to the decision on the statute of fines, 4 H. VII. c. 24. settled in *Doe d. Durore v. Jones*,<sup>(a)</sup> that no sub-

(a) Ante, 60.

sequent disability will stop it : but here the disability continued from the death of the person last seised until after the lessor's title accrued, and the time never began to run during the brother's life-time. In another view of the case, a difficulty was imposed upon the jury without necessity, in requiring them to find the exact period of the death of the brother of the lessor, which they could not properly do without evidence. It would have been sufficient for them to have found that he continued abroad till his death, and that he died within ten years before the ejectment brought. And if there were sufficient evidence before them to have raised that presumption, the court will not send the cause to a new trial, when the same verdict ought to be found.

The court did not hear counsel in support of the rule ; but thought at any rate there must be a new trial.

Lord Ellenborough, Ch. J. The time allowed by the statute for making an entry might be indefinitely extended, if the construction contended for by the plaintiff were to be admitted. [ \*68 ] There is no calculating how far it might be carried by parents and children dying under age, or continuing under other disabilities in succession. The brother, John, through whom the lessor of the plaintiff, Frances, claims, being under the disability of non-age at the time of the father's death, when his title first accrued, and dying under that disability, it appears to me that the proviso in the second clause of the statute (where resort is to be had to it to extend the period for making an entry beyond the twenty years) required the lessor Frances, as heir to her brother, to make her entry within ten years after his death ; and that not having done so this ejectment was brought too late. The word *death* in that clause must mean and refer to the death of the person to whom the right first accrued, and whose heir the claimant is : and the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to

whom the right first accrued during the period of disability, and who died under such disability; (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired.) As to the period when the brother might be supposed to have died, according to the statute 19 Car. II. c. 6. with respect to leases dependent on lives, and also according to the statute of bigamy, (1 Jac. I. c. 11.) the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea \*on his second voyage, [\*69] which seems to be the last account of him. That was about the year 1778, which would carry his death to about 1785.

Lawrence, J. Upon the death of the father Thomas Jesson, in 1777, the right descended to John, the son, then under age, who died under that disability. The lessor Frances is the heir of John; and the statute gives to the party to whom a right of entry accrues, and who is under a disability at the time, ten years after the disability removed, notwithstanding the twenty years should have elapsed after his title first accrued; and to his heir the statute gives ten years after the death of such party dying under the disability. Here more than ten years had elapsed after the death of the brother before this ejectment was brought. It appears probable enough, upon looking into the case of *Stowell v. Lord Zouch*,<sup>(a)</sup> that the word *death* was introduced into the statute of James in order to obviate the difficulty which had arisen in that case upon the construction of the statute of fines, 4 H. VII. c. 24. for want of that word.

Grose and Le Blanc, Js. assenting, the rule was made absolute.

(a). *Flawd.* 265.



*Of Actions on Contracts.—Exception concerning Merchants.*

[1] SUCH accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, are

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[1] In the case of *Ramchander vs. Hammond* (2 Johns. Rep. 202, 203,) The SUPREME COURT of the State of New-York said: "Our Statute of Limitations excepts "actions which concern the "trade of merchandise between merchants." These words are "not so broad as to warrant a departure from the adjudications "which have been made on the English act. These words, like "those of the statute of JAMES, must be confined to actions on "open or current accounts; they do not extend to accounts *stated*. "It must be a *direct* concern of trade; liquidated demands, or bills "and notes, which are only traced up to the trade of merchandise, are too remote to come within this description."

The Statute of Limitations is a bar to merchants, all accounts having ceased about six years. *Barber vs. Barber*, 18 Ves. Jun. Rep. 286. *Sed vide Foster vs. Hodgson* 19 Ves. Jun. Rep. 185, 186, where the question is discussed, but left undecided.

The saving in the 4th section of the Act of Limitations of Virginia, (1 Rev. Code, 488,) applies to the 7th section of the same act; by which, an action between merchant and merchant is neither barred by one year nor by five years. *Moore vs. Mauro*, 4 Rand. Rep. 488.

A. B. and C. entered into partnership in trade and merchandize in 1767, and continued business until May, 1774, when B. died and the partnership was thereby dissolved, and afterwards C. died in 1782, and A. in 1788, without the partnership accounts having been settled; and in 1794, the representatives of A. filed a bill in Chancery against the representatives of the other partners, for an examination and settlement of accounts, and for the payment of a balance claimed; the bill was dismissed, on account of the lapse of time, and the death of the parties, the Court considering it a stale demand. *Ray & Al. vs. Bogart & Al. (In Error)* 2 Johns. Cas. 432. & vide *Ellison Survivor, &c. vs. Moffatt & Al.* 1 Johns. Ch. Rep. 46.

excepted out of that clause, which enacts, that all actions of account, and upon the case, shall be commenced and sued within six years next after the cause of such action. This exception may be considered with respect to the parties, and the nature of the accounts. With respect to the parties, the exception extends to all merchants, as well inland, as to those trading beyond sea, though this has been doubted.<sup>(a)</sup> And it has also been extended to other tradesmen, and persons having mutual

(a) Chan. Cas. 152. 2 Saund. 126.

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Where there is a joint purchase of goods, and one of the purchasers takes the whole stock of goods and agrees to account to the other for his share of them, or of the nett proceeds, and to charge no commission in case of sale, this is not "a trade of merchandise between merchant and merchant, their factors and servants." within the meaning of the exception in the statute of limitations. And where a Bill in Equity was filed for an account against the party who had received and sold the goods, after a lapse of six years, the Statute of Limitations was held to be a good plea: for it is not the case of technical trust, of which a court of Chancery has peculiar and exclusive jurisdiction. Nor are the defendants, in that sense, to be considered as trustees; for the Plaintiffs had a perfect remedy at law, against them. The statute, in such case, begins to run from the time the plaintiffs demanded their share of the goods or the proceeds; and the defendants having rendered an account of the sale, the right of action was then perfect. *Murrays vs. Coster & Al.* 20 Johns. Rep. 576. (*In Error.*) & vide same case (*Coster & Al. vs. Murrays.*) 5 Johns. Ch. Rep. 522, 531, in which the CHANCELLOR decided, that this case was not within the exceptions of the statute, but that it was a trust, & vide *Murrays vs. Coster & Al.* 4 Cow. Rep. 617, 627, 637. (*In Error*) where the decision in the same case (20 Johns. Rep. 576) is recognized and confirmed.

The account in behalf of one tenant in common against the co-tenant for perception of profits is within the Statute of Limitations. And the Court in the decree should not go back for a greater period than five years. *Coleman vs. Hutchenson*, 3 Bibbs' Rep. 210.

The exception of the Maryland Statute of Limitations, in favour of "such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants which are not resident, within this province," applies to dealings between a merchant creditor residing out of Maryland and a debtor residing in Maryland. *Bend & Al. vs. Jay*, 7 Cranch Rep. 350.

dealings; though, formerly, it was thought that no sort of tradesmen, but (a) merchants, were within the benefit of the exception; and that it did not extend to shopkeepers, they not being within the same mischiefs. In *Cotes v. Harris*, (b) it was held, that the exception extended to cases where there were mutual accounts and reciprocal demands between two persons; but not in the case of a tradesman and his customer, the items of credit being all on one side. In *Cranch v. Kirkman*, (c) both parties were tradesmen. And when it was contended, that the exception extended to no other description of persons [ \*71 ] but merchants, Kenyon, Ch. J. overruled the \*objection, as he did also in the subsequent case of *Culling v. Skoulding*, (d) where the parties were an attorney and a chandler.

Where the last item of an account is not within six years, the plaintiff relying on this exception, by his replication shows that the case never was within the statute; and must support that replication by proving himself to have been a merchant, and the account to be between merchant and merchant, his factor or servant, and be concerning merchandise. [1] But if there have

(a) 7 Mod 270.

(b) Bull. N. P. 149.

(c) Peake's N. P. 121.

(d) 6 T. R. 109.

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[1] Where an account between merchants, has been of long standing, and the last item in it, entered more than six years, still if there had not been an actual settlement, it is to be considered a running account, and not barred by the Statute of Limitations. *Franklin vs. Exors. of Camp (In Error)* 1 Cōxe's Rep. 196.

Unliquidated accounts between merchants in the capacity of principal and factor are not within the act of limitations. *Stiles vs. Donaldson, (In Error,)* 2 Yeates' Rep. 105.

In the case of *Mandeville & Al. vs. Wilson*, (5 Cranch, 18, 19. MARSHALL, Ch. J. delivered the Opinion of the Court, "That the "exception in the statute applied to actions of *assumpsit*, as well as "to actions of account. That it extended to all accounts current "which concern the trade of merchandise between merchant and "merchant. That an account closed by the cessation of dealings

been mutual dealings and credits between persons not within the description in the statute, some of the items being of more than six years' standing, and others within that time, [2] the

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"between the parties is not an account stated, and that it is not necessary that any of the items should come within the five years."

An action of account between merchant and factor, is not barred by the Statute of Limitations, although the declaration sets forth and counts upon an accountable receipt in writing. *Pond vs. Pond*, 2 *Root's Rep.* 41

The plaintiff brought an action of debt on bond in the Common Pleas of Philadelphia county; the defendant pleaded *payment*, and gave a notice of *set-off*: On the trial, the bond being proved, without any indorsement of a payment, for principal, or interest, the defendant, by way of set-off, offered evidence to shew, "that after the execution of the bond and before the commencement of the suit, the plaintiff had become indebted to him in a sum exceeding the amount of the bond, upon accounts still remaining unliquidated and unsettled between them, as merchants, concerning the sales of merchandize made by the plaintiff, in parts beyond the seas, as agent and factor for the defendant." To the admission of this evidence, the plaintiff objected, that there was a lapse of more than seventeen years, since the date of the last item of the accounts, and no proof given of any subsequent demand of the money now proposed to be set-off; and that the long acquiescence of the Defendant, as well as the positive bar of the Statute of Limitations, must be sufficient to prevent his recovering, or defalcating the amount. The Court below, however, admitted the evidence, upon which a verdict was found in favour of the Defendant for a balance: The plaintiff took a bill of exceptions to the decision, and brought a writ of Error, to the Supreme Court; but that Court were unanimously, of Opinion, that the accounts, on which the set-off had been claimed, were not within the Act of Limitations; and that the *Common Pleas* had done right in admitting the evidence offered by the defendant. Judgment affirmed. *Stiles, plf. in Er. vs. Donaldson*, 2 *Dall. Rep.* 264.

[2] An account, many items of which arose within six years before suit, is not barred by the Statute of Limitations as to those items which arose more than six years before suit brought. And this rule extends as well to the defendant's account, introduced by way of set-off, as to the plaintiff's. *Tucker vs. Ives*, 6 *Cow. Rep.* 193. *Smith vs. Ruecastle*, 2 *Halst. Rep.* 357.

courts, by an equitable construction of the exception, and to

If part of an open current account be within six years, it draws after it items beyond six years, so as to protect them from the statute. *Coster & Al. vs. Murrays*, 5 Johns. Ch. Rep. 522. *Ex'rs. of Burnet vs. Admr. of Bryan*, 1 Halst. Rep. 377. *Bennett vs. Davis*, 1 N. Hamp. Rep. (A.) 19. *Cogswell's Executrix vs. Dolliver*, 2 Mass. Rep. 217.

To bring a case within the exception, there must be mutual accounts between the parties. Where all the items are on one side, the last item, though within six years, does not draw after it those of longer standing. *Coster & Al. vs. Murrays*, 5 Johns. Ch. Rep. 522. *Bennett vs. Davis*, 1 N. Hamp. Rep. (A.) 19. *Miller vs. Cotwell*, 2 South. Rep. 577.

An admission of mutual unliquidated accounts, on which each party claims a balance to be now due to him, takes a case out of the Statute of Limitations. *Ellis vs. Jarvis*, 3 Mason's Rep. 457.

In connected transactions and accounts between the parties, if one party is out of the Statute of Limitations, the other party is out also. A receipt in full of all accounts, cannot be opposed, either in law or equity, to a debt then due by bond; but the party holding such receipt may shew, by oral testimony, that by the settlement upon which such receipt was given the bond was extinguished. Any advances by the obligor to the obligee, of money or property, which cannot be shewn to have been paid in discharge of the bond, will come within the operation of the Act of Limitations. *Johnson vs. Carneal's Admr.*, Litt. Select Cas. 172. & *Vide Terri's Adm'rs. vs. Southall's Ex'or.* (In Error.) 3 Bibb's Rep. 460.

In an action of book debt, the plaintiff may exhibit an account of more than six years standing, to countervail the account of the defendant, for articles delivered within six years. *Nichols vs. Leavenworth*, (In Error.) 1 Day's Rep. 245.

In the case of the *Surviving Partners of McNaughton & Co. vs. Norris' Survivors, &c.* (1 Hayw. Rep. 216.) the principal question of law was, Whether the Act of Limitations runs from the date of each article in the account, or from the date of the last article only? ET PER CURIAM. "The act runs from the date of the last article in the account only, where the account has been running on from its first commencement; but where it is once deserted or ended between the parties, then from that time."

prevent such account from being divided, have considered the last items of credit evidence of an open account up to that time, and such open account to be within the equity of the exception, consequently, do extend this construction to the parties to the account.

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The plaintiff charged for services performed in the year 1792, and from thence until the death of the testator in 1800; and gave credit for a plantation, within three years. The Statute of Limitations was pleaded; and on the trial the defendant's counsel examined as to the value of this plantation, endeavouring to bring out that it was of more value than the amount at which it was credited. But the COURT (HALL, Judge,) said; "For all items above three years, the Act of Limitation bars the plaintiff, unless the defendant has made some promise to pay within the three years. Keeping an account against the plaintiff, and charging him with items within three years, admits a current account, and amounts to a promise to pay the balance; and so takes it out of the act. The defendant, in the present instance, has produced no such account, but he has claimed a credit arising within three years; and that is equivalent if the jury chuse to consider it so, to keeping an account against the plaintiff; and then the act will not bar any part of the plaintiff's account." Verdict accordingly. *Newsome vs. Person's Adm'rs.*, 2 Hayw. Rep. 242. & Vide *Kimboll vs. Person's Adm'rs.*, 2 Ibid. 394, 395.

An account, on the face of it, is barred by the Statute of Limitations; but the plaintiff enters a credit of recent date, which the defendant disavows: such entry, without some further proof, will not take the account out of the statute. No man can make testimony for himself or be a witness in his own case. *Executors of Taylor vs. McDonald*, 2 Rep. Const. C. So. Car. 178.

Services rendered by the plaintiff for the defendant on board of a steam boat, of which the defendant is sole owner, cannot be connected with those rendered by the plaintiff on board another boat, of which the defendant was agent but only part owner, in order to repel the plea of prescription. *Chadwick vs. Waters*, 3 Mart. Rep. (N. S.) 432.

Where an executor put bonds and notes due to the testator, into the hands of an attorney to collect, and after the death of the executor, the attorney collected the money and applied it to his own use, and became insolvent: *Held*, that the estate of the executor was not chargeable with the loss, especially after a lapse of more than six years. *Rayner, Adm'r. &c. vs. Pearsall & Al.* 3 Johns. Rep. 578.

With respect to the nature of the account, the distinction, as it may be collected from the cases, is between such as are current and open, and stated accounts. Current accounts are considered to be within the exception; on the contrary, stated accounts have been constantly held to be barred by the statute.[3]

A matter(a) was referred to the three justices of the king's bench, Jones, Croke, and Barkely, between Sir G. Sandys [\*72] and one Blodwell. There was an account \*between the testator of Sandys and the said Blodwell, both merchants. Blodwell acknowledged 1,200*l.* to be in arrear, but Freeman claimed more. Before the account was finished, Freeman died, and his executor filed a bill in chancery against Blodwell, who pleaded in bar the statute of limitations. And the justices certified that he was not barred, because the account was not finished, and also because it was between merchants.

Assumpsit(b) by *Webber, merchant*, against *Tivill, merchant*, for money had and received, goods sold and delivered, and also on an account stated, upon which the defendant was found in

(a) Jones, 401.

(b) 2 Sanad. 124.

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[3] In the case of *Edwards vs. Davis*, (4 *Bibb's Rep.* 211, 213.) *Boyle, Ch. J. delivering the Opinion of the Court, said*; "It has long since been settled, that open or current accounts only are within this exception; and consequently it does not apply to a case like the present, where there is a liquidated sum stated to be due and agreed to be paid by the defendant." & *Vide Kimball vs. Person's Adm'rs.* 2 *Hayw. Rep.* 394, 395.

Where an account between merchants has been balanced, and a balance carried forward, it is no longer an open and running account, and the parties cannot go behind such settlement, without leave obtained upon a bill in Chancery, to inquire whether the balance is founded in error. Such an account is not within the exception relative to merchants' accounts. *The President, &c. of the Union Bank vs. Knapp*, 3 *Picks. Rep.* 96.

arrear in 55*l.* 11*s.* 7*d.* promise to pay, &c. Plea, the statute of limitations. The plaintiff replies, that the moneys in the several promises mentioned, became due and payable on trade between the plaintiff and defendant as merchants, and wholly concerned merchandise: upon which the defendant demurred in law. And the question was, whether this debt, for which the plaintiff declared, were excepted out of the statute of limitations?

Saunders, who reports this case, and was counsel for the plaintiff, says, that the whole court was against the plaintiff, for the reasons urged by Jones: who argued that the case is not excepted out of the statute; for the statute intends to except nothing concerning merchandise between merchants, but only accounts current between them; and the reason was, because it often happens that merchants, who are as partners, or hold correspondence one with the other in several parts of the world, may have accounts current between them for several years \*before they have an opportunity of meeting to [\*73] state their accounts, and therefore the statute does not mean to limit such accounts. But here it appears that the account for the 55*l.* 11*s.* 7*d.* was *stated and agreed*, and then immediately it becomes a debt certain, being ascertained by the account, and continually afterwards remains as a dead debt, and there is no continuing account between the plaintiff and defendant to save it out of the statute of limitations. And for this debt, after the account stated, the plaintiff might have brought his action of debt; which would, without doubt, have been limited to six years by the statute; and therefore it is unreasonable that the plaintiff, by changing his action of debt to an action on the case, should elude a statute which was made for the public good. That actions of account on accounts between merchants are only excepted; but this is not an action of account, but a bare action on the case, which, as it appeared to him, was not excepted at all.



And as to the other part of the declaration, that was more clear, because that was only a bargain for wares sold, and for money lent; and although it concerned merchandise, and was between merchants, yet that was no reason why it should be excepted out of the statute: for if it should be excepted, by the same reason every contract made between merchants would also be excepted, which was not the intention of the statute; for in the statute, accounts between merchants only are excepted, and not contracts likewise.

So, where in *assumpsit*(a) the doubt was, whether the declaration amounted to an account stated; for if it did, [ \*74 ] \*then from that time it was not within the exception in the statute; for, from the stating of the account, that becomes a certain debt which was before an uncertain one. And, therefore, though an account be running twenty years, or upwards, between merchants, yet there is no danger from the statute, because of the exception, which was made for a good reason. And this diversity between accounts stated and unstated, as it was said, had been often agreed, and was not denied by the courts.

So, in an *indebitatus assumpsit*(b) for money had and received to the plaintiff's use, and a *quantum meruit* for wares sold, and an *inimul computasset*, &c. to which the defendant pleaded "*non assumpsit infra sex annos*;" the plaintiff replied, that this action was grounded on the trade of merchants, and brought against the defendant as his factor, &c.: the defendant rejoined, that this was not an action of account, to which the plaintiff demurred; and it was said by the court, that the saving extends only to accounts between merchants, their factors and servants; and an action on the case will not lie against a bailiff or factor, where allowances and deductions are to be made, unless the account be adjusted and stated, as it was resolved in Sir Paul Neal's case against his bailiff. Where the account is

(a) 1 Sid. 466.

(b) 2 Mod. 312.

once stated, as it was here, the plaintiff must bring his action within six years; but if it be adjusted, and a following account is added, in such case the plaintiff shall not be barred by the statute, because it is a running account; but if he should not be barred here, then the exception would extend to all actions between merchants and their factors, as well as to actions of account, which was never intended; and \*there- [ \*75 ] fore this plea is good, and the saving extends only to actions of account.

In another report of this case, (a) North, Ch. J. Windham and Scroggs, Js. resolved, that the exception in the statute goes only to actions of account, and not to other actions. And they took a diversity betwixt an account current and an account stated. After the account stated, the certainty of the debt appears, and all the intricacy of account is out of doors; and the action must be brought within six years after the account stated. But, by North, if after an account stated, upon the balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account between the same parties, it is now slipped out of the statute again. And, by Scroggs, J. the statute makes a difference betwixt actions upon account and actions upon the case. The words would else have been, "all actions of account, and upon the case, other than such actions as concern the trade of merchandise;" but it is otherwise penned, "other than such actions as concern," &c. and as this case is, there is no action betwixt the parties; the account is determined, and the plaintiff put to his action upon an *in simul computasset*, which is not within the benefit of the statute.

To an action on the case, (b) brought upon a promise made by the defendant to pay a bill of exchange drawn fourteen years before, the defendant pleaded the statute of limitations. The plaintiff replied, that the bill was a negotiating bill, and that it

(a) 1 Mod. 270.

(b) 4 Mod. 108.

was upon an account between merchants, &c. The  
[ \*76 ] defendant demurred, and had judgment, because the statute excepts only accounts which are current between merchants, and not any which are stated; for if an action is brought against a drawer for value received, that is no account current, but an account stated.

It was also said, in the case of *Scudamore v. White*,<sup>(a)</sup> in chancery, that the statute of limitations is no plea in bar to an open account.

It is observable, that, in the above cases, wherein the plaintiff has relied on the exception concerning merchants to avoid the statute of limitations, the accounts had been stated and settled, and a balance struck, for which the action was brought more than six years afterwards: and it may be collected from them, that when the intricacy of account is removed by a statement, the statute of limitations attaches from the time of such statement: but although the inference from those cases is, that no length of time will bar the plaintiff from recovering while the subject matter is in account, and the specific remedy is the action of account; yet this must be received with some qualification; for if, between merchant and merchant, dealings betwixt them have ceased for several years, and one of them die, and the surviving merchant bring a bill for an account, the court will not decree an account, but leave the plaintiff to his remedy at law.

The plaintiff's<sup>(b)</sup> late husband, and defendant, had dealings together as merchants, the bill was for an account; and although it was agreed that the length of time was no  
[ \*77 ] bar, yet the plaintiff's husband living many years \*after the trade and dealings between them ceased, and after some differences and disputes had arisen between them, and acquiesced to the time of his death; the court therefore

(a) 1 Vern. 456.

(b) 2 Vern. 276.

dismissed the bill, and left the plaintiff to recover at law, if she could. Per Lord Hutchins.—Amongst merchants, it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or third post.[1]

I find it impossible to trace the gradual progression, from the strict construction of the exception apparently established in the above cases, and that which, at the present day, takes other accounts, neither relating to merchandise nor to merchants, out of the statute: but certainly a more favourable construction for the plaintiff prevails; for the statute says, that no action of account, other than such as concern merchandise between merchant and merchant, their factors and servants, shall be excepted from the limitation. To give effect to what has been admitted to be evidence of an open account, the accounts themselves, when evidenced, have been considered of the nature of those within the exception. For the equity would, in fact, have done nothing, by admitting the last item of a mutual account between persons not merchants, for items not strictly of merchandise, to be evidence of an open account, if, when the account were so proved to have been open up to that time, the plaintiff could be turned about by being told, that though he had proved his account, he had not taken his case out of the statute, by proving it likewise an account for merchandise between merchants. The exception in the statute, according to the argument of Jones in *Webber v. Tivill*,(a) and the \*opinion [\*78] of Atkyns, J. in *Farrington v. Lee*,(b) extends to accounts only which, from their nature, might be unavoidably

(a) Ante, 72.

(b) Ante, 74.

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[1] Sed Vide the case of *Mandeville & Al. vs. Wilson*, 5 *Cranck's Rep.* 18, 19, (cited ante, page 71, note [1.]) in which the SUPREME COURT of the United States decided, "That an account "closed by the cessation of dealings between the parties is not an "account stated, and that it is not necessary that any of the items "should come within the five years."

kept open for many years; and not to those which, from the circumstance of the parties being inland merchants or shopkeepers, might be liquidated within the time limited: therefore, the admission of evidence to prove the existence of an open account, would have proved only such an account as the statute bars after six years, had not the courts of law gone further, and considered the parties to be merchants, and the accounts to be as between merchant and merchant. Otherwise the accounts would be divided, and that part which was more than six years' standing could not be allowed.

Lord Hardwicke was aware of the difficulty in the construction of this exception; and what was laid down by him in chancery, in the case of *Welford v. Liddell*,<sup>(a)</sup> may have had considerable influence on the present practice. It is not, he said, that the defendant may not plead the statute in all cases where the account is closed and concluded between the parties, and all dealings and transactions over: it was not the meaning to hinder that; but it was to prevent dividing the account between merchants, where it was a running account; when, perhaps, part might have begun long before the time of the statute, and the account never settled; and perhaps there might have been dealings and transactions within the time of the statute.

The following cases will exemplify the construction of the exception as it is now acted upon, both with respect to the accounts, and the evidence of their existence.

[\*79] \*In the case of *Cotes v. Harris*,<sup>(b)</sup> the plaintiff replied a bill of Middlesex; and that the testator, in his life-time promised to pay within six years before the bill of Middlesex sued out.

The first item in the bill, whereon the demand arose, was in 1748; and all the items, except the last, were above six years'

(a) 2 Vez. 400.

(b) Bull N. P. 149.

standing before the bill of Middlesex sued out. It was insisted for the plaintiff, that the last item being within six years, and this being a current account, never liquidated, should draw the former items out of the statute. But Denison, J. held that the clause in the statute of limitations about merchants' accounts, extended only to cases where there were mutual accounts and reciprocal demands between two persons; but if there were only a demand by A. against B. in the common way of business, as by a tradesman on his customer, that cannot be called merchants' accounts: and he was very clearly of opinion, that in this case the statute was a bar to all demands of above six years standing. But,

In *Cranch v. Kirkman*,<sup>(a)</sup> there were mutual dealings. It was an action for goods sold and delivered by the testator, to which the defendant pleaded the general issue, and gave a notice of set-off for goods sold and delivered, &c.

The defendant's set off consisted of several items for goods sold at different times, from 1783 to 1788. The plaintiff's demand accrued chiefly in the year 1783, but there were two small articles sold in the year 1789.

\*It was contended, on the part of the plaintiff, that [ \*80 ] the greatest part of the set-off was within the statute of limitations, no promise being proved within six years: but lord Kenyon said, he thought this was within the exception in the statute as to merchants' accounts.[1] He agreed that, where the demand of one party arises long after the demand of the other, that should not revive the antecedent account; but this was in the nature of a running and mutual account between the parties; and was precisely the case put by Mr. Justice Denison in *Cotes v. Harris*,<sup>(b)</sup> which his lordship said he particularly remembered; and, of which he believed, no one

(a) Peake, 121.

(b) Ante, 79.

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[1] Vide page 71, Note [1.]

but himself had taken a note; the report of it which appeared in print having been furnished by himself.

In the case of *Culling and another, Executors of Tuthil, v. Skoulding and another*,<sup>(a)</sup> assumpsit was brought for the use and occupation of a house, &c. in the lifetime of the testator; and other common counts. The defendant pleaded, first, the general issue; secondly, the statute of limitations; and, thirdly, a set-off for goods sold and delivered. The replication to the second plea was, that the defendant did promise within six years, on which issue was joined. To the third plea, that the testator was not indebted to the defendants, as in that plea alleged.

The testator was an attorney at H., the defendant and another partner, who suffered judgment to go by default, were merchants, dealers in spirituous liquors, and tallow-chandlers, and hired of Tuthil the premises in question, at the time [ \*81 ] of whose death nine years and a half rent \*was due up to Michaelmas, 1779, amounting to 209*l.* and also 20*l.* for cash on account, on the 19th of October, 1781. During the time that these arrears of rent were becoming due to the testator, the defendants furnished him with various articles in the way of their trade. The balance due to the estate at his death was above 171*l.* There never was any settlement of accounts between the testator and the defendants. The last half year's arrear of rent, and one or two of the last articles of the defendants' bill, were within six years before the plaintiff's writ was sued out.

It was objected for the defendants, that upon the words of the statute, the exception is confined, first, to actions of account; and, secondly, to such accounts as were between merchant and merchant; and, thirdly, to such as concerned merchandise. It must be an account current, kept between the parties as such, and not certain specific cross demands, of a

distinct nature, as in this case; the demand being on one hand by an attorney, for use and occupation, and on the other hand, for a chandler's bill: for otherwise every cross demand might be converted into an account current, to prevent the operation of the statute. But even if it were considered as an account current, the law would not raise a promise merely on that account; and that such an account was not within the exception of the statute. And, secondly, that the replication was bad, being too general; and that it ought to be according to the precedent in *Webber v. Twill*.<sup>(a)</sup>

But it was adjudged by Lord Kenyon and the Court, that where there is no item of account at all within six years before the action brought, the plaintiff will be [\*82] precluded, unless he can bring his case within the exception of the statute concerning merchants' accounts; and in such a case his replication must bring his case within the statute. But it must be remembered, that there the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years: for by his replication he insists, that his case never was within the statute, for that the "accounts were between merchant and merchant," &c. But the present case steers wide of that objection; it is not doubted but that a promise or acknowledgment within six years will take the case out of the statute; and the only question is, whether there is not evidence of an acknowledgment in the present case. Here are mutual items of account; and every new item and credit in an account, given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is after to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account, is sufficient to take the case out of the statute. Daily experience teaches us, that if this rule be now overturned, it will lead to infinite injustice. In *Cotes v. Harris*<sup>(b)</sup> all the items were on one side; and Deni-

(a) 2 Saund. 124.

(b) Ante, 79.



son, J. who well knew what was the proper replication in such cases, and was well acquainted with the import of the Statute of Limitations, said, where all the items were on one side, the last item which happens to be within six years, shall not draw after it those that are of longer standing : but it was not doubted there, but that if there had been mutual demands, the plaintiff might have recovered.

[ \*83 ]      \*Where the scope of an act appears to be in a general sense, the law looks to the meaning, and extends it to particular cases within the same reason ; therefore, actions of assumpsit are considered to be within the statute, though not specifically mentioned, because within the same mischief as those limited : and another reason, (a) that actions of trespass, mentioned in the act, are comprehensive of assumpsit, because it is a trespass on the case.[1]

(a) 2 Mod. 71. 3 Saund. 120.

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[1] The People not being named in the fifth section of the act for the limitation of criminal prosecutions and of actions at law, (1 N. R. L. 484. sess. 24. ch. 183.) are not bound by it, and may bring a personal action at any time. *The People vs. Gilbert*, 18 Johns. Rep. 227.

In the case of *Wilcox qui tam. &c. vs. Fitch*, (20 Johns. Rep. 473,) which was an action of debt brought on the fourth section of the statute of Frauds, (Sess. 10. ch. 44. 1 N. R. L. 75.) WOODWORTH, J. who delivered the Opinion of the Court, after specifying the limitations contained in the 6th section of the Statute of Limitations, said ; “ Neither of these limitations apply to the case “ under consideration, for here the penalty is limited, and given to “ the party aggrieved and the people, in equal portions ; no other “ person is entitled to sue and recover. The consequence is, that “ this case not being within any of the limitations in the statute, “ the suit is not barred by length of time ; since by the common law there was no stated or fixed time as to the bringing of “ actions. (*The People vs. Gilbert*, 18 Johns. Rep. 228.)”

Where a plaintiff commenced an action against the defendant for money which he had paid as security, to which the defendant pleaded the Statute of Limitations : *Held*, that the statute did not

The statute may be pleaded<sup>(a)</sup> to indebitatus assumpsit against the sheriff for the money levied upon a fieri facias; but if case were brought, for not bringing the money into Court at the return of the writ, *per quod damnum habet*, the statute would not be pleadable; for in the one form the action is founded on the contract, but in the other it is grounded on a specialty, viz. the record of the judgment of the Court.[2] It was said<sup>(b)</sup> to

(a) 1 Mod. 246.

(b) 1 Mod. 246.

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commence running, until the plaintiff paid the money for the defendant. *Thompson vs. Stevens*, 2 Nott. & McC. Rep. 493.

The defendant in the court below, assigned to the plaintiff below, part of the amount due upon a bond from third persons, but retained the bond in his own hands, and afterwards received the money; an action on the case was brought; and upon the plea of the Statute of Limitations, it was *Held*, that the Statute did not begin to run until the money was received by the assignor. *Hubbard vs. Prather & Smiley*, (In Error.) 1 Bibb's Rep. 178.

[2] The Statute of Limitations is a good plea to an action of debt brought on a Judgment in *Connecticut*. The Judgments of courts of other states, are simple contract debts. *Hubbell, Survivor, &c. vs. Coudrey*, 5 Johns. Rep. 132. *Bissell vs. Hall*, 11 Johns. Rep. 168. *Pease vs. Howard*, 14 Johns. Rep. 473.

But in the case of *Mills vs. Duryee* (7 Cranch's Rep. 481, 484.) STORY, J. who delivered the Opinion of the Court, (JOHNSON, J. dissenting,) after citing the constitutional provision, and the Act of Congress, of 26th May, 1790, ch. 11. relative to the faith and credit that "shall be given in each State to the public acts, records and "judicial proceedings of every other State," and to the mode of "authenticating such records, &c. said, "It is argued that this act "provides only for the admission of such records as evidence, but "does not declare "the effect" of such evidence when admitted, "This argument cannot be supported. The act declares that the "record duly authenticated shall have such faith and credit as it "has in the State court from whence it is taken. If in such court "it has the faith and credit of evidence of the highest nature, viz, "record evidence, it must have the same faith and credit in every "other court. Congress have therefore declared the effect of the "record by declaring what faith and credit shall be given to it."—"Were the construction contended for by the plaintiff in Error to

have been resolved that the Statute of Limitations was not a

prevail, that Judgments of the state courts ought to be considered *prima facie* evidence only. this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgment precisely the same effect. It is manifest however that the constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision."

And in the case of *Andrews vs. Montgomery & Al.* (19 Johns. Rep. 164.) SPENCER, Ch.J. (who delivered the Opinion of the Court,) after stating the decision in the case last cited, said; "In *Borden vs. Fitch*, this court did not believe, that the decision in *Mills vs. Duryee* was intended to be carried so far as to preclude the party against whom it was rendered, from showing that such judgment was fraudulently obtained, or that the state court had not jurisdiction of the person of the defendant. With these qualifications, we are bound, by the authority of that case, to consider a judgment fairly and regularly obtained in another state, as full and conclusive evidence of the matter adjudicated. In the present case we are bound to consider the judgment set forth in the declaration, [it was a judgment of a court of Common Pleas in the State of New-Jersey,] as a debt of record due from the defendants to the plaintiff. Independently of the consideration, that a decision of the Supreme Court of the United States, is entitled to the highest respect, in all cases, a decision upon provisions of the constitution, is emphatically, entitled to our utmost respect. I consider that Court as paramount, when deciding on an article of the Constitution, and an act of Congress passed under its express injunction; and whatever might be my individual opinion, I should feel it my duty to surrender it to their controlling authority. I must, however, be permitted to say, that the opinion expressed by Mr. Justice STORY, coincided entirely with my private opinion." "The plaintiff has counted upon the judgment in *New-Jersey*, as a simple contract; and accordingly it is set forth as a promise to pay the amount adjudicated. Now it is well settled, that *assumpsit* cannot be supported, when there has been an express contract under seal or of record." "In *Pease vs. Howard*, (14 Johns. Rep. 479.) this court decided that a judgment in a Justices' Court was not within the Statute of Limitations, like a foreign Judgment, and that it was in the nature of a specialty. The Judgment recovered in *New-Jersey* being admitted by the pleadings, and standing totally unimpeached, we are bound to consider it as fairly and justly obtained, as establishing a debt of record against the defendant. It is not, therefore, merely *prima facie* evidence

good plea against an attorney that brings an action for his fees, because they depend upon a record and are certain. In the case of *Rudd v. Berkenhead*, (a) no such objection was made to the plea in an action of assumpsit by an attorney; but in *Oliver v. Thomas*, (b) where assumpsit was brought for fees and money expended, and labour and pains in prosecuting divers suits, the

(a) Carth. 144.

(b) Lev. 367.

"of a debt like a foreign judgment, but absolute and decisive evidence of a debt."

Do not these cases virtually over-rule, the case of *Hubbell vs. Coudrey*, (5 Johns. Rep. 132.) and the other cases which were decided on the same principle?

In an action of debt on a foreign judgment, the declaration stating the foundation of the Judgment to be a specialty, the Statute of Limitations is not a good plea. *Richards, Admr., &c. vs. Bickley, Admr.* 13 Serg. & R. Rep. 395.

"There is no limitation, by statute, to an action of debt or Scire facias upon a judgment, except only in the case of a judgment on which no execution has been taken out; and in cases of Executors and Administrators, upon a judgment against their testator or intestate. In all other cases, these remedies are left as at the common law; and at common law, there was nothing like a limitation upon them, except the presumption of satisfaction, arising from a delay to proceed upon the judgment for 20 years, which might be repelled by circumstances." *Randolph's Administratrix vs. Randolph*, 3 Rand. Rep. 493. (per GREEN, J. delivering the Opinion of the Court.)

A recognizance taken to the State Treasurer in a criminal prosecution, is not within the Statute of Limitation. *Kingsbury, State Treasurer vs. Phips*, 2 Root's Rep. 357.

Judgment and execution levied in 1765, claim barred in 1815, by time, though an Injunction to stay execution had issued. *Buchanan, Ezor. &c. vs. Rowland & Al.* 2 South. Rep. 721.

The Statute of Limitations is not applicable to debts by decree, order, or award; nor is the debt barred by the time the debtor remains in custody for the non-payment of the debt. *Mildred vs. Robinson*, 19 Ves. Rep. 585. 587.

defendant pleaded the statute of 21 Jac. I. of Limitations, whereupon the plaintiff demurred: and it was argued for the plaintiff, that this action being by several counts or declarations, whereof one only was for fees, and the others for money laid out, and labour and pains in the prosecution, the statute was not pleadable to that count which is for fees only, be-

[\*84] cause it arises upon matter of record, \*viz. his being attorney of record. But by the whole court, viz.

Treby, Nevile, Powell, and Rokesby, it was held, that the statute is pleadable to the count for fees; for the fees are not of record; and a case was cited where it was so adjudged within two years before, whereupon judgment was given for the defendant.

So in the case of the assignment of a debt by the commissioners of bankrupts; the assignment being by virtue of an act of parliament, it has been doubted whether the debt were not taken out of the statute. In *assumpsit*, (a) as assignee of the commissioners of bankrupts for a debt due by contract to the bankrupt, the defendant pleaded the Statute of limitations, and the plaintiff demurred; and it was argued, that the statute extends not to this case, the debt being assigned by virtue of an act of parliament, and said to have been so adjudged; whereupon a day was given to show that record: but there is no such question at the present day; for it has long been settled, that when the time of limitation once begins to run, nothing subsequent stops it; although Holt, Ch. J. (b) is reported to have held otherwise, being of opinion that an administrator should have six years from the time of granting the administration; but the current of authority and the practice is the other way.

To an action (c) by the assignee of the commissioners of a bankrupt, the defendant pleaded "non assumpsit infra sex annos;" and the plaintiff replied the bankruptcy and assignment,

(a) 2 Lev. 166.

(b) Carth. 337.

(c) Str. 555.

and that the cause of action arose within six years before the assignment. The Court, on demurrer, held the replication to be ill, because, when the six years were once begun, the statute runs over all mesne acts, \*such as cover- [\*85] ture, and infancy, as in the case of a fine. And it would be to defeat the statute, as to all simple contracts, if an assignment at the end of five years and a half were to set all at large again.

The South Sea Company(a) (in whom the estates of the late directors were vested by act of parliament) filed a bill to which the Statute of Limitations was pleaded; and it was argued, that the plaintiffs claiming by matter of record, the debt was taken out of the statute. But the Lord Chancellor held the law to be clearly otherwise; for that the South Sea Company could not be in a better situation than Surman was, against whom, as the defendant might have pleaded the statute, so might he also do, against the Company, who stood but in Surman's place: and he likened it to the case of an assignee under a commission of bankruptcy, who, though he claims under the acts concerning bankrupts, and also by virtue of the assignment, which is under the great seal, yet, as he stands only in the place of the bankrupt, against whom the statute of limitations is pleadable, so is he (the assignee) liable to be barred thereby.

But where the whole of a bond has been paid by one obligor, and he brings assumpsit against his co-obligor for contribution, it is doubtful whether the Statute of Limitations would be a good plea, or whether such action would not be allowed the same limitations as the bond itself.[1]

(a) P. W. 144.

[1] In an Action of Assumpsit by a Surety in a Bond, who has paid a part of the debt, against the principal, the Statute of Limitations is a good plea. *Penniman & Al. vs. Vinton & Al. Admrs. &c.* 4 Mass. Rep. 276.

Lord Kenyon observed, in the case *Cole v. Saaby*,<sup>(a)</sup> which was by the executor of one obligor against the [ \*86 ] \*co-obligor for contribution, that he had considerable doubts whether the Statute of Limitations attached on the case. The demand arose under a deed; and there had been a case in which a very considerable law authority had

(a) 3 Esp. 160.

The complainant and defendant had, at the request of *Wyld*, become endorsers of a set of Bills of Exchange which he drew on a mercantile house in *London*; the complainant, also endorsed other bills to a considerable amount, for *Wyld*; but receiving information that the bills would be protested, he obtained a conveyance to himself, of the whole estate of *Wyld*, in trust for the payment of his debts. The bills were returned protested, and payment of them demanded from the complainant, who in the year 1753, (the same year in which the bills were drawn, and returned protested) sold the whole estate on six months' credit, and set industriously about the collection of the debts. He discharged the debts due from *Wyld*, in the order of priority mentioned in the deed, as the money came to his hands and as he could spare it from his own estate. The whole debts were paid by the month of *October*, 1762. It then appeared that his payments had exceeded his receipts and left him, in advance for *Wyld*, to a large amount; which must fall on the bills endorsed by the complainant and defendant, as that was the last mentioned debt in the said deed. The trust estate was not closed until 1765. The complainant being much perplexed with business did not apply to the defendant until some time in the year 1766; when he transmitted to the defendant an account claiming a moiety of the money paid by the complainant on the bill endorsed by them both, with interest from *October*, 1762. Payment was refused; and this suit was instituted in 1768. The defendant pleaded the Act of Limitations; and, in his answer, stated that he did not recollect, or admit having endorsed the bill; that he had no notice of its protest or of its payment, until 1766; and that he knew not whether the complainant had, or had not expended the trust estate; or whether he had paid any part of the bill. It appeared, however, from the report of the Commissioners to whom the accounts were referred, that the bill of exchange was taken up by the complainant, and his own bond executed for the amount thereof, in *November*, 1765, *Held*, that the Act of Limitations could "not be considered as commencing till the trust was closed, which was in 1765; and in 1768 the suit was instituted." *Lomax vs. Pendleton*, 3 *Call's Rep.* 538. 542.

been of opinion, that such a debt was entitled to the same limitation as the deed itself.

All contracts<sup>(a)</sup> are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there a third class, as contracts in writing. If they be merely written, and not specialties, they are parol. It may be laid down as a rule, that parol contracts are within the Statute of Limitations, and barred after six years,[1] and that contracts founded

(a) 7 T. R. 850.

[1] Vide, *Nafie vs. Executors of Ackerman*, 2 Pen. Rep. 562.

When money is deposited with one man for the use of another, the cause of actions accrues to him who is to receive it from the time of the deposit, and from that will the Act of Limitations commence running. *Buckner vs. Patterson*, Litt. Select. Cas. 234. *Coomer vs. Little*, Cam. & Norw. Rep. 2.

Sed vide, *Johnston vs. Humphrey's Admr. &c. In Error*, 14 Serg. & R. Rep. 394, CONTRA.

Where a promise is made to pay a debt, the statute of Limitations begins to run from the time of the promise; and so even though the promise be to pay on a future contingency; for the Statute is not suspended until the contingency happens. *Admr. of McDowell vs. Exors. of Goodwyn*, 2 Rep. Const. C. So. Car. 441. & vide *Painter vs. Smith*, Exor. &c. Root's Rep. 142.

In the case of *Sweat vs. Arrington, Admr. of Armstrong*, (2 Hayw. Rep. 129,) JOHNSTON, J. who delivered the Opinion of the Court, said; "In 1783, Armstrong drew the pay of the plaintiff, a soldier, who lived (near the place where the commissioners sat,) for five or six years afterwards, and never made application in his life time. I am of opinion the Act of Limitations began to run from the time of the accruing of the action, and that was immediately after drawing the money."

In the case of *Bishop vs. Little* (3 Greenl. Rep. 405,) which was an action of *assumpsit*; the plaintiff being in possession of certain land claimed by the *Pejepscot* proprietors for whom the defendant assumed to act as agent, paid to defendant a certain sum of money



on specialties are not within the statute.[2] The first part of

and received a deed. At the time of the payment the plaintiff's agent expressed his fears that the title of the proprietors, did not extend so far as to include the land occupied by the plaintiff; but the defendant affirmed that it did, and said that if the deed that he was about to give to the plaintiff should not convey to him a good title thereto, he would make it good. Upon this assurance the money was paid, and a deed of release and quit-claim was made to the plaintiff. Within six years prior to the commencement of the plaintiff's action, but more than six years after the payment of the money and delivery of the deed, it was ascertained that the title of the proprietors did not extend so far, as to cover the plaintiff's farm; and he thereupon brought his suit to recover back the purchase money and interest. The defendant pleaded the general issue, and the *Statute of Limitations*. It was *Held*, (MELLEN, J. delivering the Opinion of the Court,) that, "When the deed was made and delivered to the plaintiff in the year 1805, the proprietors had no title to the land therein described. If the plaintiff ever had a right to recover back the consideration, he had on then; there was at that moment, if ever, a failure of consideration."

"It was urged by the plaintiff's counsel, that as this want of title was not discovered till within six years, the Statute is no bar; that it did not commence running until the discovery was made. Such however is not the law. No case can be found where the Statute has been avoided at law or in equity, unless on the ground of fraudulent concealment on the defendants part. *First Mass. Turnpike Corp. vs. Field*, 3 Mass. 201, was a case of such concealment." We perceive no principle of law which can save this cause from the operation of the Statute."

A verbal contract, respecting lands, made before the Statute of Frauds, is valid and the Act of Limitations begins to run from the breach of the contract. *Allen & Al. vs. Beal's Heirs*, 3 Marsh. Rep. (Ky.) 555. *Oventon vs. Tracey*, 14 Serg. & R. Rep. 311.

The Statute of Limitations does not apply to trusts; but an executor paying more money to a distributee than is due to him, creates no trust in such distributee; he holds in his own right and adversely to the executor; and on this ground the operation of the Statute cannot be evaded. *Turner & Al. Exors. vs. Debell*, Exor. 2 Marsh. Rep. (Ky.) 384.

A demand which is barred by time, at Law, will not be aided in

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[2] Vide post.

the rule has admitted of some exceptions, but the latter part of

Equity, if no circumstance is shewn excusing the neglect and laches of the complainant. *McDowell vs. Heath's Exors.* 3 Marsh Rep. (Ky.) 223.

"Until the cause of action accrued, the Statute would not begin 'to run.' *Overton vs. Tracey*, 14 Serg. & R. Rep. 328, (per DUNCAN, J. delivering the Opinion of the Court.) Same point, *Montgomery vs. Hernandez, & Co.* 12 Wheat. Rep. 129. 134.

In the case of *Glasgow's Admr. vs. Porter & Al.* (1 Har. & Johns. Rep. 109.) which were actions of Debt on Bonds, CHASE, Ch. J. said; "The Court are of opinion that the Act of Limitations does not begin to operate until the expiration of the time 'limited for the payment of the money.'"

The Statute of Limitations does not begin to run against a party, until his claim accrues. *Scott's Exor. vs. Osborne's Exor. & Munf.* Rep. 413. & vide *Thompson vs. Stevens*, 2 Nott. & Mc C. Rep. 493. & vide *Chandler & Al. vs. Chandler & Al.* 4 Pick. Rep. 78. *Shearman & Al. vs. Akins, Administratrix*, 4 Pick. Rep. 283.

Statutes of Limitation, only take place from the time when the right of action accrues; and if there be fraud from its discovery. *Jones vs. Conoway & A. Ex'ors. &c.* 5 Yeates' Rep. 109.

Against a debt due on condition, prescription does not begin to run until the condition is accomplished. *Le Changeur vs. Gravier's heirs*, 2 Murt. Rep. (N. S.) 545.

A receipt or acquittance of any kind, is not within the Statute of Limitations; that Statute can never operate against a release or acquittance, because so much as is mentioned in a release or a discharge, is an extinguishment of the debt or demand *pro tanto*. Every receipt is a release in law, and extinguishes a debt or demand as effectually as a release under hand and seal. *Admr. of Comptey vs. Alken*, 2 Bay's Rep. 48. 483.

Where an administrator pays a debt in full, upon an erroneous belief that the estate of his intestate is solvent, an action to recover back part of the money paid does not accrue until the insolvency of the estate is ascertained by a decree of insolvency and order of distribution; and consequently the Statute of Limitations begins to run from that time. *Walker vs. Bradley*, 3 Pick. Rep. 261.

B. bequeathed a legacy to J., and appointed E. his executor,

it has been unvarying; and although the words of the statute

who paid the legacy to J., and took his bond on the 25th of April, 1797, conditioned to refund the legacy, or a rateable part thereof, if a deficiency of assets should actually happen, after request should be made; and there being a deficiency of assets, and the estate overpaid by E., he brought an action on the above bond on the 24th of February, 1816, against J., who defended himself under the Act of Limitations. *Held*, that as the cause of action first accrued in 1814, when the deficiency of assets was ascertained, the Act of Limitations was no bar. *Salisbury vs. B. & C. Administrator*, 6 Harr. & Johns. Rep. 293.

The Act of Limitations is a good plea to a suit in Equity, brought to recover money collected by an attorney for the plaintiff, and not accounted for by him. *Kinney's Exors. vs. McClure*, 1 Rand. Rep. 284.

Where the defendant obtained possession of divers promissory notes without a legal transfer from the owner, and received payment of some of them more than six years, and of others within six years, next before the commencement of the action, it was *Held*, that he was liable in *assumpsit*, for the sums received within the six years, and that he was estopped to say that the notes were obtained by fraud, and so an action of trover would have been barred by the Statute. *Lamb Executor, &c. vs. Clark*, 5 Picker. Rep. 193.

The Statute of Limitations does not begin to run against a parol guarantee of the sufficiency of a mortgage, given to secure a bond payable by instalments, and of the solvency of the mortgagor, until six years after the last instalment has become due. *Overton vs. Tracey*, 14 Serg. & R. Rep. 311.

In an action of *assumpsit*, for negligence, want of skill, and fraud, in the performance of work, the defendant pleaded the Statute of Limitations: *Held*, that the plaintiff cannot reply a fraudulent concealment of the badness of the work by the defendant, so that the plaintiff did not discover the fraud until within six years before the commencement of the suit, so as to deprive the defendant of the protection of the Statute. *Troup vs. Smith's Exors.* 20 Johns. Rep. 33. *See vide, The first Massachusetts Turnpike Corporation vs. Field & Al.* 3 Mass. Rep. 201. 207. CONTRA

In the case of *Hale vs. Andrus*, (6 Cow. Rep. 225,) which was an action of *assumpsit* on a parol promise of indemnity, the defendant pleaded 1st, *non assumpsit*; 2d, *non assumpsit infra sex annos*; 3d, *actio non accrevit infra sex annos*; to which

limit to six years all actions of debt for arrearage of rent, the

2d and 3d pleas the plaintiff replied, *assumpsit & accrevit, infra sex annos*; on which issue was joined. A verdict was taken for the plaintiff subject to the Opinion of the Court; and WOODWORTH, J. who delivered that Opinion, after stating the pleadings, said; "The pleas of the Statute of Limitations are no bar. As to the plea of *non accrevit*, it appears from the evidence, that the *gravamen*, upon which the plaintiff relies to recover, is within six years. The plea of *non assumpsit infra sex annos*, does not apply to the case. The promise was made more than six years before suit brought; but it was a promise to indemnify against liabilities on the bond executed by the sureties of Bealls. The Statute did not begin to run from the time of making the promise; but from the time damages were sustained. The plea, therefore, was bad in substance, and is not cured by the replication. The issue was immaterial and interposes no obstacle in the plaintiff's way. If the issue had been found for the defendant, the result would have been the same. In that case, the plaintiff would be entitled to judgment notwithstanding the verdict."

Where a note was endorsed by the holders to a Bank for collection; whose notary negligently omitted to charge a prior endorser by giving notice of non-payment; and the Bank was sued, by the holders, for the neglect, and compelled to pay damages, and thereupon brought an action of assumpsit against the notary; Held, that the cause of action arose immediately on the omission of the notary; and the Bank not having sued till more than six years after, were barred by the Statute of Limitations. And this, though the former suit, and recovery against the Bank, and payment of damages by the Bank to the holders, were all within six years before the commencement of the suit by the Bank against the notary. *The President, &c. of the Bank of Utica, vs. Childs*, 6 Cow. Rep. 238.

If money be received as a deposit for a special purpose, and the party who receives it, instead of applying it to that purpose, uses it, he cannot set up the Act of Limitations as a bar to the recovery by the party entitled to it. *Johnston vs. Humphrey's Admr. &c. (In Error)*, 14 Serg. & R. Rep. 394.

Where A. under a contract to deliver *Spring* wheat, had delivered to B. Winter wheat, and B. having sold the same as Spring wheat, had in consequence been compelled, after a suit in *Scotland* which lasted many years, to pay damages to the vendee, and B.

construction is, that the rent, to be within the statute, must

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afterwards brought *Assumpsit* against A. for breach of contract, alleging as special damage, the damages so recovered; *Held*, that although such special damage had occurred within six years before the commencement of the action by B. against A., yet that the breach of contract, which in *Assumpsit*, was the gist of the action, having occurred and become known to B. more than six years before that period, A. might properly plead, *actio non accrevit infra sex annos*. *Battley & Al. vs. Faulkner & Al.* 3 *Barnew. & Ald. Rep.* 38.

A promissory note is made more than six years ago, and deposited with a banker, to be delivered, to the payee, on his producing a certain other note cancelled. The cause of action to the payee on the first note, accrues on his receiving it from the banker, and is not barred either by the lapse of six years from the date, or by the bankruptcy and certificate of the maker, which intervene between the date of the note, and its delivery, by the banker to the payee. *Savage vs. Aldren*, 2 *Stark. Rep.* 206.

In the case of *Montgomery vs. Hernandez & Co.* (*In Error*, 12 *Wheat. Rep.* 129. 134,) the plaintiff in Error was sued in the Court below, as surety for the Marshal of the District of Louisiana, who, by order of the District Court had sold a vessel and cargo, libelled by the defendants in Error, which vessel and cargo, or the proceeds thereof, were by the final decree of the Court of Admiralty, ordered to be restored to the libellants. The decree was appealed to the Supreme Court of the United States and there affirmed; but the Marshal had failed to pay over part of the proceeds. TRIMBLE, J. in delivering the Opinion of the Court, said; "It is perfectly clear that Hernandez & Co. had no right to demand of the Marshal the proceeds of the sales, or to sue for the recovery thereof, until after the affirmance in this Court. The right of action was suspended, during the pendency of the appeal in this Court; and during such suspension the Statute of Limitations did not run against him." & vide *Hernandez & Al. vs. Montgomery*, 2 *Mart. Rep. (N. S.)* 422.

The Statute of Limitations is a good defence to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit. *Leigh & Wife vs. Thornton*, 1 *Barnew. & Ald. Rep.* 625.

In the case of *Murray, Admr. &c. vs. The East India Compa-*

have been reserved on a parol demise; for if by indenture, it is a contract on a specialty, and excepted.[3]

ny, (5 Barn & Ald. Rep. 204,) ABBOTT, Ch. J. *delivering the Opinion of the Court*, said; "Now, independently of authority, "we think that it cannot be said, that a cause of action exists, "unless there be also a person in existence capable of suing. And "we think great deference is due to the Opinion delivered by the "Judges on this point in *Cary vs. Stephenson*."

No debt accrues on a bill payable after sight, until it is presented for payment. Therefore, the Statute of Limitations is no bar to such a note, unless it has been presented for payment six years before the action was commenced. *Helmes vs. Kerrison*, 2 Taunt. Rep. 323.

A. sold B. a tract of land on the 6th Nov. 1811, and took from him in payment therefor, a bond given by H. to C., of which B. was then the holder, without endorsement to or from B., under this special agreement; that if A. should sue H. in a short time, and if H. failed to pay, B. would then pay it. A. brought suit against H. in September, 1812, tried it in October, 1815, and failed to recover: and in October, 1816, he sued, B. and declared, first, for the price of the land sold, and secondly, upon the special agreement. *Held*, upon the pleas of the Statute of Limitations, and *non assumpsit*, that A. could not recover upon either count; for the Statute of Limitations began to run from the making of the contract as laid in the first count; and the laches of the plaintiff in not bringing suit against H. for ten months discharged B. upon the special agreement set forth in the second. *Murray vs. Smith*, 1 Hawk's Rep. 41.

By the articles of a co-partnership, the acting partner was to collect whatever debts might be due at the termination of the partnership, and account for the same as he received them, or as often as the other partners should require. The partnership was dissolved on the 4th August, 1774, except as to such matters as necessarily related to the settlement of their accounts, the collecting of their debts, and closing of their affairs. The books, &c. were left with the acting partner, who in April, 1777, exhibited a balance sheet shewing the then situation of the affairs of the concern; and in July, 1777, made a payment in part to the other partners, who being British subjects, were shortly afterwards obliged to leave the state. In 1800 a bill was filed against the exec-

[3] Vide post.

The plaintiff(a) counted upon a lease by indenture for twenty

(a) Hut. 109.

utors of the acting partner, and the defendants pleaded the Statute of Limitations. But the plea was over-ruled with costs. TAYLOR, Chief Justice, *delivering the Opinion of the Court*, said; "The statement furnished by Kennon, [the acting partner,] was to shew from time to time the progress he was making; the moneys were received by him in the character of a trustee, liable to pay what he received when his copartners should require it; and it was only when they did require it, and he refused it, that the fiduciary character was put an end to." *MacNair vs. Kennon's Exors.* 3 *Murph. Rep.* 139. 145.

Plaintiff employed defendant in 1808, to lay out money for him in the purchase of an annuity, and discovered in February, 1814, that the security provided by the defendant was void within the defendant's own knowledge at the time of the purchase. In January, 1820, plaintiff sued defendant in *assumpsit* for breach of an implied contract to provide good security: Held, that the action proceeding on the contract and not on the fraud, the Statute of Limitations was a good bar. *Brown vs. Howard*, 2 *Brod. & Bing. Rep.* 73.

In cases of implied trusts in relation to personal property, or to the rents and profits of real estate, where persons claiming in their own right are turned into Trustees by implication, the right of action in equity, will be considered as barred in six years, in analogy to the limitations of similar actions at law. *Hawley & Al. vs. Cramer & Al.* (In Equity, 4th Circuit,) 4 *Cow. Rep.* 718.

There is no analogy between a trust account and a common account; no analogy, in cases of trust, to the Statute of Limitations. *The Attorney General vs. The Brewer's Company*, 1 *Meriv. Rep.* 495. 497.

If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to re-deliver the residue unsold, on demand. And an action does not lie against him for not accounting, till after a demand made of an account. Therefore the Statute of Limitations runs only from the time of a demand made. After a reasonable time elapsed, a jury might presume that the consignor had made a demand, and that the factor had accounted, and it seems,

years, rendering rent : and in debt for the arrearages of the rent,

that 14 years would be a sufficient time for such presumption, if it were not rebutted by circumstances. *Topham vs. Braddick*, 1 Taunt. Rep. 572.

[2] In the case of *Pease vs. Howard*, (14 Johns. Rep. 479.) it was decided that a judgment in a Justice's Court is not within the Statute of Limitations, like a foreign judgment. VAN NESS, J. who delivered the Opinion of the Court, said ; " Whether a Justice's Court is strictly a court of record, it is not material to determine in this case ; for if it be not, it is settled, that a judgment rendered in it is conclusive evidence of a debt, and the merits of such a judgment, while it remains in force, cannot be overhaled or controverted in an original suit at law, or in equity ; and it is as final, as to the subject matter of it, to all intents and purposes, as a judgment in this Court. A foreign Judgment being *prima facie* evidence of the debt only, has been considered as of no higher nature than a simple contract, and a necessary consequence of this is that the Statute of Limitations may be pleaded to it. But a judgment in a Justice's Court is of a higher nature than a foreign judgment, because its merits cannot be controverted in a suit founded upon it." " A Justice's judgment is a debt of a higher nature than a simple contract debt, and is as much a specialty as a judgment obtained in this Court, which, clearly, is not barred by the Statute of Limitations. Neither is a debt of this description within the words of the statute ; and every Statute of Limitations, being in restraint of right, must be construed strictly. It is not a bar to every action of debt, but only to those brought for arrearages of rent, or founded upon any contract, without specialty. It has been held that debt on an Indenture reserving rent, is not within the Statute, notwithstanding the generality of its terms (*Saund.* 38. ;) and the settled construction of the Statute is, that it applies solely to actions of debt founded upon contracts in fact, as distinguished from those arising by construction of law. Now, in this case the action is not founded upon a contract in fact. It has been held that debt upon a recovery in trover or trespass in the County Court or Court Baron, and in various other inferior tribunals in England is not founded upon any contract in fact between the parties, and, therefore, not barred by the Statute. (2 *Saund.* 64, 65, &c. in notes and cases there cited.) Such, too, is the case of an action of debt founded upon a Statute ; for which this reason is given, that a Statute is a specialty. (1 *Saund.* 36, 37. in notes.)" & vide *Andrews vs. Montgomery*, 19 Johns. Rep. 165.

In the case of *Bullard vs. Bell*, (1 *Masons' Rep.* 243. 288, 289.)



it appeared that the arrearages of rent, for which the action was

it was *Held*, That a Bank note payable to *W. Pitt*, or bearer, is in effect payable to the bearer; and, as between any *bona fide* holder and the Bank, such holder is to be deemed the bearer, to whom the Bank is originally liable. *A fortiori*, the holder may maintain a suit against a Stockholder upon default of payment of such note under the provisions of the Bank Charter making the Stockholders personally liable for such note in case it is dishonoured. The Statute of Limitations of New-Hampshire (which is, in this respect, a transcript of the Statute 21 Jac I. ch. 16. does not apply as a bar to an action of debt upon such statutable provision, for it is not founded upon any contract or lending without specialty. *Storv, J.* in delivering the Opinion of the Court, said; "Nothing can be clearer than that this is not a case of lending; and it would be very artificial reasoning to consider it a case of contract; it is certainly not a case of express contract; and the most that can, by the utmost straining, be asserted, is, that it is a case arising *quasi ex contractu*. It is in truth, however, a mere legal liability, created by Statute, which may furnish the foundation or consideration of a contract express or implied, but is not itself a contract." "In the present case the plaintiff has not declared on any contract, nor has the law necessarily created one; and, therefore, in this view, the plea cannot on principle be supported. But if it were otherwise the Statute of Limitations applies only to contracts, not grounded on a specialty. Now the present action is founded on a Statute, which the law deems for this purpose a specialty; and for this reason also the plea is bad. If the case were new, therefore, we should have no difficulty in over-ruling the plea; but the point has been directly decided by authorities, which cannot now be controverted. (*Jones vs. Pope*, 1 Saund. R. 37. *Hodsdon vs. Harridge*, 2 Saund. R. 61. 65. *Com. Dig. Temps.* (G. 15.) *Talory vs. Jackson*, Cro. Car. 513.)"

In a suit for the balance due on a Bond payable in 1775; the last payment that had been made was in 1774; the obligor died some time in the year 1782; and his executors, (against whom the suit was brought) qualified in the same year. The Court said; "We are of opinion that the plaintiff is barred by the act of 1715, referred to, [*North Carolina*] more than seven years having elapsed from the death of the debtor before this suit was brought." *Exors. of Dry vs. Exors. of Roper*, Cam. & Norw. Rep. 311, 312. But see *Ogden, Admr. &c. vs. Blackledge, Exors. &c.* 2 Cranch's Rep. 272, *CONTRA*; It was there decided that, the ninth section of the act of Assembly of *North Carolina*, passed in 1715, which directs that, unless the creditors of deceased persons shall make their claim within 7 years after the death of the debtor

brought, were due six years and more before the action brought.

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they shall be barred, was repealed by the act of 1789, c. 23, notwithstanding the act of 1799, which declares the contrary. A legislature cannot declare what the law *was*, but what it *shall be*.

A delay of twenty years to demand the money, or bring a suit upon a contract under seal, will raise a presumption of payment; but this may be repelled by shewing that the covenantee died after the money fell due, leaving the contract in the hands of his attorney, who did not deliver it to the administrators, or place it within their control, till a number of years after the covenantee's death, it not appearing that they had any knowledge of the contract at the time of making out the inventory of their intestates' estate. *Jackson ex dem. Marvin & Al. vs. Hotchkiss*, 6 Cowen's Rep. 401.

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[3] An action for rent reserved by indenture of lease is not within the Statute of Limitations. *Bailey vs. Jackson*, 16 Johns. Rep. 210. *Pease vs. Howard*, 14 Johns. Rep. 480. *Kane vs. Bloodgood & Al.* 7 Johns. Ch. Rep. 116.

But where more than twenty years, before the commencement of the action, have elapsed since the last quarter's rent became due, payment of the rent will be presumed. But as the presumption of payment is not a legal bar, it may be repelled by circumstances. *Bailey vs. Jackson*, 16 Johns. Rep. 210.

To induce the presumption of payment from the age of a bond, 20 years must have elapsed exclusive of the period of the plaintiff's disability. *Dunlop & Co. vs. Ball*, 2 Cranch. Rep. 180.

"There is no legal bar by force of the Statute of Limitations to a legacy. It cannot be pleaded, but still the Court, justly averse to giving countenance to very stale demands, adopts the provisions of the statute as a guide in the exercise of its discretion." *Arden's Ex'ors. vs. Ex'ors. of J. Arden*, 1 Johns. Ch. Rep. 314. (per KENT, Ch.) *Same point, Decouche & Al. vs. Savetier & Al.* 3 Johns. Ch. Rep. 190. *Durdon Ex'or. vs. Gaskill*, 2 Yeates' Rep. 271.

In the case of *Ward vs. Rseder*, (2 Harr. & McHen. Rep. 154.) THE COURT said, "The recovery of a legacy, for a further reason, cannot be barred, because it may be stopped until debts be paid, and it would be uncertain when an action could be commenced."

But in the case of *Kane vs. Bloodgood & Al.* (7 Johns. Ch. Rep.

CH. 4.]      *Of Actions on Contracts.*

The Lord Richardson was of opinion that judgment should be given against the plaintiff, because the statute [ \*87 ] \*extends to debts for arrearages of rent expressly; but afterwards changed that opinion, and agreed with the other judges of the Common Pleas, Hutton, Harvey, and

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118.) KENT, Ch. after citing the case of *Brereton vs. Gamul*, (2 Atk. 240.) said, " This case very clearly shews, that, where there " is a legal and an equitable remedy, in respect to the same sub- " ject matter, the latter is under the control of the same statute " bar with the former." & *Vide Smith, &c. vs. Carney & Alios*, 1 Litt. Rep. 297, (Same point.)

" It is a general rule in the books, that there is no statute of lim- " itations to a charge upon an estate." *Kane vs. Bloodgood & Al.* 7 Johns. Ch. Rep. 116. (per KENT, Ch.)

Payment of a bond will not be presumed from lapse of time alone within a shorter period than twenty years. But where the demand is a stale one, the plaintiff will be held to strict proof of the amount of damages which he is entitled to recover. *Cottle vs. Payne*, 3 Day's Rep. 289.

A debtor executes a warrant of attorney to his creditor to confess judgment for the balance of an account as stated between them. The warrant of attorney is not a specialty which takes the case out of the Statute of Limitations. *Clarke, Ex'or. &c. vs. Figes*, 2 Stark. Rep. 207.

An action was brought against the administrators of a surety on a bond given by a collector of taxes, conditioned for the faithful performance of his duty as such collector! It was stated in the pleadings that the Court of Probate had limited a time for all claims of debt against the estate of the deceased surety, to be exhibited to the administrators; and that before the expiration of that term the collector had failed to settle with the treasurer, though there had been no proceedings against the *Selectmen*, or *Inhabitants* of the town, for the recovery of any of the taxes which the collector had failed to settle and collect, till after the expiration of the term limited by the Court of Probate for the settlement of the surety's estate. On demurrer, it was *Held*, " That the fail- " ure of the Collector to pay the taxes to the Treasurer, was a " breach of the condition of the bond; and the plaintiff's having " neglected to exhibit their claim, according to the order of the " Court of Probate, they were by law barred and foreclosed of any " recovery on said bond." *Randal, &c. vs. York & Al. Adm'rs, &c.* Kirb. Rep. 314.

Yalverton, that this action of debt, being upon a lease, by indenture, is not limited to any time by the statute, but is out of it, and shall be brought as before the making of this statute. The words are, "All actions of debt grounded upon any leading or contract without speciality, all actions of debt for arrearages of rent," &c. and this is an action upon a contract by speciality, 4 H. VI. c. 31. he ought to declare upon the indenture, and it is a contract, viz. a lease: and there is cause of using the indenture every half year; and it was resembled to the case upon the Statute of 32 H. VIII. of Limitation. A rent-charge, which is founded upon a deed, or a reservation upon a fee-simple by deed, is not within the Statute of Limitations. And nothing in this statute was intended to be limited which was founded upon a deed. And the words "debt for arrearages of rent," are supplied and satisfied by the arrearages of rent upon a demise without a deed. And as to the objection, that the proof of payment might be wanting, when the action is brought so long after the rent became due, that might be objected to debt on an obligation, where the day of payment is for a long time past.[1]

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[1] In the case of *Williams' Exors. vs. The Mayor, &c. of Annapolis*, (6 Harr. & Johns. Rep. 529.) on appeal from a decree of the Court of Chancery; it appeared that *Williams*, in 1785, leased from *The Mayor, &c.* a lot of ground for 99 years, renewable forever at a fixed rent, and covenanted in the lease to pay the rent. He entered upon the property and paid the rent until 1803. The lease was not legally acknowledged or recorded. In 1812, *The Mayor, &c.* brought an action of covenant at law against *Williams*, to recover the rent, and failed, because of the defective execution and acknowledgment of the lease. *Williams*, and those claiming under him, remained in undisturbed possession of the property. In 1815, *The Mayor, &c.* filed their bill in Chancery against *Williams*, to compel him to account for the rents from 1608, and to accept a new lease formally executed. *Williams* afterwards died, and the suit was revived against his executors. *Held*, that the complainants were entitled to recover the rents, with interest, and that neither the judgment at law, nor the Statute of Limitations, could affect their claim. But that the executors of *Williams*, were not bound to accept a new lease. And the decree of the CHANCELLOR was affirmed by the COURT OF APPEALS.

So where debt(a) was brought on the Statute of Tithes,(b) for carrying away the corn, the tithes not being set out, 20 Jac. I. and 21 Jac. I. and so on, until the 11 C. I. the defendant pleaded for the last three years non debet, and for the residue, the Statute of Limitations. And hereupon the plaintiff demurred; [ \*88 ] and the record \*being read, all the Court held that the statute does not extend to this action.

Nor to debt(c) for an escape of one in execution; because the words of the statute are, that all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent shall be brought within six years. And this action of debt is not within the statute for two reasons; first, because the action is not founded upon any lending or contract, therefore not limited or restrained by the statute; and, secondly, that the action of debt on an escape is founded on a specialty, namely, upon Statute Law, and so out of the Statute of Limitations.[1] For at Common Law(d) no action of debt lay against a gaoler for an escape out of execution. The statute 1 Rich. c. 12. gave to creditors an action of debt against the warden of the Fleet upon an escape out of execution; and the statute, by construction, extends to all other gaolers and sheriffs; and so the statute is a specialty upon which the action is founded, and it is therefore clearly out of the words and intention of the Statute of Limitations.

It was said by Buller, J.(e) that this action of debt depends upon two very old statutes, which never have nor can be construed literally; the first of which is Westminster 2. which is entitled, "The masters' remedy against their servants or accomptants." If we were to stop here, this case would not come

(a) Cro. Car. 513.

(b) 2 Ed. VI. c. 13.

(c) 1 Samd. 35.

(d) 2 Inst. 382.

(e) 2 T. R. 182.

[1] "An action grounded upon a statute, cannot be barred; such as debt for an escape, &c." (PER CURIAM.) *Ward vs. Reed-er*, 2 Harr. & McHen. Rep. 154. *Ballard vs. Bell*, 1 Mason's Rep. 389.

within it : but then it enacts, " Let the sheriff take heed that he do not suffer him (the prisoner) to go out of prison ; and if he do, and be thereof convict, he shall be answerable to his master of \*the damages done to him by such his [ \*89 ] servant, according as it may be found by the country, and shall have his recovery by writ of debt." This statute therefore enacts, that the creditor shall recover against the gaoler those damages which he has suffered by his servant : and this statute, by a liberal construction, has been held to extend to all cases. The next is the statute of 1 Rich. I. c. 12. which, in express terms, mentions only the warden of the fleet : but that also, by construction, has been extended to all gaolers. The sense of these statutes is, that the party who suffers by the escape, shall have the same remedy against the gaoler which he had against the debtor.

But to an action on the case against the sheriff for an escape, the statute of limitations may be pleaded ; because the action lays at common law, and is not dependent on any specialty, but the escape, which is a naked matter of fact. Per Buller, J.(a) The distinction between an action of debt and on the case is this ; at common law, an action on the case only lay against the sheriff or gaoler for an escape, in which case the creditor might recover damages for the officer's misconduct ; but still he had a right to recover the debt against the original debtor. But the statutes gave an action of debt against the sheriff or gaoler to recover at once the sum for which the prisoner was charged in execution. Now these being affirmative statutes, did not take away the common law remedy, so that the creditor has his election ; but if he adopt the latter, he must recover the whole sum.

\*Debt was brought on an award : (b) the declaration stated, that there were divers controversies between plaintiff and defendant concerning certain moneys due,

(a) 2 T. R. 120.

(b) 2 Saund. 64.

&c. ; and for quieting those controversies, on such a day they submitted themselves to the award of two arbitrators ; and if they should not agree by a certain day, then to the umpirage of an umpire, to be chosen by the arbitrators, so as the umpirage should be under the hand and seal of the umpire before a certain day. It then averred, that the arbitrators made no award, but chose one W. who, within the time, made an umpirage under his hand and seal, and awarded the defendant to pay 15*l.* for which the action was brought. Plea, the statute of limitations, to which the plaintiff demurred.

And it was argued for the plaintiff, first, that this was a specialty, for the umpire had made his umpirage in writing under his hand and seal ; and that notwithstanding a man cannot wage his law against a specialty, but may wage his law against an award in writing under hand and seal, unless the submission were by specialty under the hand and seal of the party who submits to such an award, and that this was not such a specialty as should oust the party of his law, yet it was a good specialty to prevent the limitation of the action upon it to six years, on account of the notoriety of the thing, being in writing, and in hand and seal.

2dly. It was argued, secondly, that admitting there was no specialty, yet the action of debt on an award was not limited by the statute ; for the words being, "all actions of debt [ \*91 ] grounded upon any lending or contract without \*specialty," &c. ; therefore, all actions of debt without specialty generally, are not limited, but only those without specialty, grounded on a lending or contract ; and that this action of debt was not founded upon any lending, and therefore not limited, though it be without specialty. That all actions of debt are founded upon a contract raised either in fact, or by construction of law : and if the statute meant to limit all actions of debt generally, without specialty, the words "grounded upon any lending or contract" would be superfluous ; but that the statute intends to restrain and limit those actions only which

were founded upon any lending or contract in fact, as appears by the words : and the word lending explains the word contract to be of the same nature. That in the present case, the action of debt was not founded upon any lending or contract, but was a debt *ex quasi contractu*, according to the civilians, for which the law gives an action of debt, although there is no contract between the parties.

Kelynge, Ch. J. principally for the first point ; Twisden principally for the second ; and the other judges \*for both points, resolved for the plaintiffs that the action was not within the statute of limitations.

To an action of debt brought by an executor against a sheriff, to recover money levied on a *feri facias*, under an execution sued out by the testator, the defendant cannot plead the statute of limitations.

The plaintiff(a) declared, that his testator recovered a judgment in the common pleas, upon which he sued out a *feri facias*, which he delivered to the defendant, [\*92] being sheriff of Lincoln ; and thereupon the sheriff returned *feri feci* ; but that he had not paid the money to the plaintiff, *per quod actio accrevit*, &c. The defendant pleaded the statute of limitations, to which the plaintiff demurred. And the question was, whether this action was barely grounded on the contract, or whether it had a foundation on matter of record ? And the case was held not to be within the statute, because the action was brought against the defendant as an officer who acted by virtue of an execution, in which case the law did create no contract ; and that there was a wrong done, for which the plaintiff had taken a proper remedy, and therefore should not be barred by this statute.

In another report(b) the action is said to be upon the case

(a) 2 Mod. 212.

(b) 1 Mod. 296.



against the sheriff, for that he levied such a sum of money upon a *feri facias*, at the suit of the plaintiff, and did not bring the money into court at the day of the return of the writ, *per quod*, &c. And by the court—If the *feri facias* had been returned then, the action would have been grounded upon the record, and it is the sheriff's fault that the writ is not returned; but, however, the judgment in this court is the foundation of the action.

From which cases it will be collected, that wheresoever the debt is founded on a specialty, it is not within the statute.[1] Other exceptions have been taken, as in cases where the debt has arisen out of any lending(a) or contract in fact, although without specialty, and in those actions that rarely occur. [ \*93 ] Therefore debt for a copyhold fine(b) has been adjudged not to be within the statute, because there is no lending or contract in fact. Nor upon the writ *de rationabili parte bonorum*, because a case that seldom happens.

In the common pleas,(c) upon *non detinet* pleaded to such a writ, it was found that the plaintiff was entitled to this action many years before the statute 21 Jac. I. and that he had not brought his action within the time limited. Upon the special verdict, the case being argued, was adjudged for the plaintiff: because this action is an original writ in the register, and is not mentioned in the act. And though the issue is *non detinet*, it is not an action of detinue, for a writ of detinue lies not for money, unless it be in bags; but *rationabili parte bonorum* lies for money in *pecuniis numeratis*. Another action lies not before the debts are paid: and the account was, that thereby it might be known for what it should be brought; and that, in many cases, requires longer time than the statute gives.

Another reason was, that the statute was not made to ex-

(a) 1 Sauad. 35. Ib. 64.

(b) 1 Lev. 273.

(c) Hutt. 109.

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[1] Vide Page 86, note [2].

tend to those cases which seldom or never happen, as this case is; but to those which frequently happen. Also, the statute tolls the common law, and should not be extended to equity.[1]

Mr. Serjeant Williams, in his edition of Saunders, vol. 2. 67. (9.) observes, This writ lies where the wife, after the death of her husband, cannot have the third part of her husband's goods, after payment of debts and funeral expenses, and then she may have this writ against the \*execu- [ \*94 ] tors of her husband. And it seems by the statute of *magna charta*, c. 18. that this was the common law of the realm at that time: and it appears by Glanvil, that it was the common law in his time, that after payment of debts, the goods were divided into three parts; one part to the wife, another part to the sons and daughters, and the third part to the executors; and the sons and daughters are also entitled to have the like writ against the executors, in case their third part is withheld.

A debt barred by the statute of limitations(a) cannot be set off.[1] And if it be pleaded in bar of the action, the plaintiff

(a) *Stra.* 1271. *Bull. N. P.* 180. *Selw. N. P.* 139.

[1] The Statute of Limitations does not in terms apply to Chancery cases, but the Chancery courts will never interfere when by lapse of time the law Judge would not hold jurisdiction. *Frame vs. Kenny's Heirs, & Ex'ors*, 2 *Marsh. Rep. (Ky.)* 145. *Elmendorf vs. Taylor & Al*, 10 *Wheat. Rep.* 152. *Marquis of Cholmondely vs. Lord Clinton*, 2 *Jac. & Walk. Rep.* 192. & *Vide Demarest & Ux. vs. Wynkoop & Al.* 3 *Johns. Ch. Rep.* 129.

[1] But this doctrine seems to be limited to the case of a distinct and separate demand unconnected with transactions upon which the plaintiff's claim is founded, for

In the case of *Terril's Adm'rs. vs. Southall's Ex'or.* 3 *Bibb's Rep.* 460. (*In Error.*) where the defendant in error, who was plaintiff below, objected the Statute of Limitations to the set-off of the plaintiffs in error, (defendants below.) OUSLEY, J. who delivered the Opinion of the Court of Appeals, said, "If then we are correct " in this position, it furnishes an answer to the defendants' [*In Er-*

may reply the statute; or if it be given in evidence under a notice of set-off, it may be objected to at the trial.

"ror] objection that the plaintiffs' [in Error] right to relief is barred by the Statute of Limitations: for whatever might be the effect of the Statute if no connection existed between the two demands, it is clear as that of the plaintiffs' [in Error] by its peculiar connection with the defendants' [in Error,] and the agreement of the parties, operates an extinguishment, the statute cannot be brought to bear upon it."

"It is well settled, that to a plea of set-off, the plaintiff may reply the Statute of Limitations." *Banks vs. Cogle*, 2 Marsh. Rep. (Ky.) 564. (per BOYLE, Ch. J. delivering the Opinion of the Court.) & Vide (same point,) *Gilchrist vs. Williams*, 3 Ibid. 235. 237.

A matter that is barred by the Statute of Limitations, cannot be set up as a discount. *Madden vs. Madden*, 2 Rep. Const. C. So. Car. 350.

The Statute of Limitations of the country where the remedy is sought, and not of the country where the Contract was made, is the rule. *Graves vs. Graves Ex'or.* 2 Bibb's Rep. 297.

In an action of *Assumpsit*, brought in this state, the defendant may set-off demands against the plaintiff, arising when both parties resided in the state of *Connecticut*, and which, if sued for there, would be barred by the Statute of Limitations if that state, provided six years have not elapsed since the plaintiff came into this state. Courts in this state in actions on foreign contracts, are not governed by the Statutes of Limitations in other states, where such contracts were made. *Ruggles vs. Keeler*, 3 Johns. Rep. 263.

The Statute of Limitations of another state is no defence to an action brought in this state [*Connecticut*], on a contract entered into in that other state, by parties residing there at the time. *Medbury vs. Hopkins*, 3 Connect. Rep. 472. *Atwater's Adm'r. vs. Townsend*, 4 Ibid. 47.

In the case of *Bushnell vs. Brown's heirs*, (4 Mart. Rep. N. S. 499, 500.) the plaintiff in the appeal insisted in the court below that the land sold to him was deficient in quantity, and he claimed an order of survey "to establish the deficiency to the legal extent." The order was refused, whereupon the plaintiff took a bill of exceptions and appealed to the Supreme Court; and MARTIN, J. in delivering the Opinion of the Supreme Court, said; "The order of survey was refused because the plaintiff suffered one year to elapse

It was a question formerly, whether the statute extended to mariners' wages :—[2]

"without complaining of this deficiency." [This is the time limited for bringing suit for any defect or deficiency in the thing sold, *Vide Civil Code of Louisiana, Tit. 7. ch. 6. sect. 3. §1. Art. 2512.*]

"We think the District Judge erred. It is true the plaintiff could not have been heard on a suit against his vendors; but it does not follow that he could not use as a shield what he no longer could use as a weapon. *Qua temporalia sunt ad agendam, perpetua sunt ad excipiendum.*"

[2] The Statute of Limitations of Massachusetts (which as to this point is a transcript of the statute 21 Jac. I. c. 16.) applies only to suits at common law for mariner's wages, and not to suits in the admiralty. *Brown vs Jones, 2 Gallis. Rep. 477.* (In this case STORY, J. who delivered the Opinion of the Circuit Court, said; (page 481.) "It is not a little remarkable, that the Act of Congress regulating suits for mariner's wages in the admiralty, contains no limitation as to the time, within which such suits shall be brought. And as the admiralty and maritime jurisdiction is exclusively confided to the courts of the United States, it would be very difficult to maintain, that a Statute of Limitations of a state could *proprio vigore*, apply to suits on the admiralty side of these courts. The provision in the 24th section of the Judicial Act [24 Sept. 1789, ch. 20.] extends only to trials at Common Law; and in no other cases can state regulations or limitations govern the Courts of the United States, unless they fall within the principles of universal law, which direct and limit the application of the *lex loci.*"

The Statute of Limitations of a State is no bar to a suit on the admiralty side of the Courts of the United States. *Willard & Ux. Adm'r. vs. Dorr, 3 Mason's Rep. 91. 93.*

The Statute of Anne, (4 An. ch. 16. §17.) limiting suits in the admiralty for seaman's wages to six years, is not a bar to such suits in the Courts of the United States. *Ibid.*

But, Courts of Admiralty will not entertain suits upon stale demands. Twelve years' delay, if unexplained, will affect a demand with the character of staleness. *Willard & Ux. Adm'r. &c. vs. Dorr, 3 Mass. Rep. 161. & Vide Same Case, Ibid. 95.*

To a libel in the admiralty<sup>(a)</sup> by the seamen against the owners for wages, the defendants pleaded the statute of limitations, viz. that it appeared by the libel that no suit was prosecuted for this matter within six years; whereas they should have pleaded directly, that no suit had been brought within six years after the cause of action accrued; and if the statute had been rightly pleaded it would have been a good bar: for, per Holt, Ch. J. Though the statute doth not extend to causes maritime, spiritual, or equitable, but only to duties at common law, yet mariners' wages are a duty at common law, and if  
 [\*95] sued \*for at common law, the statute would have been a good bar.

And upon a motion for a<sup>(b)</sup> prohibition to the admiralty, suggesting a contract at land, and a suit for wages thereon by the mariners against the owners, upon an outward-bound voyage, and that he had pleaded the statute of limitations in that court, which plea was rejected for that the statute did not extend to causes maritime, &c. And it was insisted for the prohibition, that the common law had a proper jurisdiction for mariners' wages, and that the suit might be as well brought for such wages in the courts of common law as the admiralty; so that the admiralty had at most but a concurrent jurisdiction in this case with the courts of common law, and that only by indulgence of law, which ought not to be extended so far as to suffer them to proceed in the admiralty otherwise than they might at common law. »

But the statute of 4 Anne, c. 16. s. 17. enacts, that "all suits and actions in the court of admiralty for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after." [1]

(a) 3 Salk. 227.

(b) 3 Salk. 228.

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[1. Vide Note (B.) in the Appendix; where decisions upon local and special Acts of Limitations of the several states, as distinguished from the general Acts of Limitations, are collected and arranged.

*Of Actions on Torts.*

**ACTIONS** on the case for torts, other than slander, must be brought within six years of the cause of action accruing: [1]

[1] An action on the case was brought for a *deceit*, the defendant pleaded not guilty within six years; and the plea held good. *Oothoudt vs. Thompson*, 20 Johns. Rep. 278.

Even though the plaintiff did not discover the fraud, until within six years prior to the bringing of the suit. *Ibid.* *Troup vs. Smith's Ex'ors.*: 20 *Ibid.* 45. 48. & *Vide* *Hamilton, Executrix, &c. vs. Shepherd, Admr. &c.*, 3 *Murph. Rep.* 115.

An action on the case was brought against the defendant for neglect of duty as a *Deputy Sheriff*, in not returning an execution in favour of the plaintiff against S. C., and for not paying over the money collected thereon. THE COURT said; "The cause of action (if any exists) did not accrue against the officer till demand; and as the record shows the demand to have been made within six years, and not before, the plea of the Statute of Limitations cannot avail the defendant." *Hutchinson vs. Parkhurst*, (*In Error*.) 1 *Aik. Rep.* 262.

In *Bree vs. Holbach*, (*Doug. Rep.* 656.) Lord MANSFIELD said; "There may be cases too, which fraud will take out of the Statute of Limitations."

If a grantor be liable on the ground of a fraud in pretending to have right when he had none, the Statute of Limitations is a bar in five years, (and not twenty years) after the fraud is discovered. *Lewis, Executrix, &c. vs. Stafford*, 4 *Bibb's Rep.* 321. (*In Equity*.)

In an action on the case to recover damages for a fraud in the sale of a land warrant; Plea, Statute of Limitations; Replication; Fraud not discovered until within three years, &c. *Held*, that the cause of action accrued when the fraud was committed, and three years having elapsed from that time before suit brought, the plaintiff was barred; not being within any of the savings of the statute. *Hamilton, Executrix, &c. vs. Shepherd, Admr. &c.* 3 *Murph. Rep.* 115.

actions for words, within two years after the words spoken.

In the case of *Mussi vs. Lorgin, the younger*, (2 *Browne's Rep.* 56.) it was *Held*, that if the jury believed there had been a fraud practised, the Statute of Limitations began to operate only from the time of its discovery. & *Vide Homer vs. Fish & Al.* 1 *Pick. Rep.* 435. *Welles, Ex'or. &c. vs. Fish & Al.* 3 *Ibid.* 74. *Brown vs. Howard*, 2 *Brod. & Bingh. Rep.* 73.

In the case of *Young vs. Williamson*, (1 *Har. & McHen. Rep.* 145.) which was a suit in replevin for a negro, the defendant pleaded *non cepit infra tres annos*, and judgment was given in his favour.

In an action of replevin for a negro, the defendant pleaded *actio non accrevit infra tres annos*; it appeared that there was a consent that the defendant's grantor should use the negro; the Court held that the statute did not run, and gave judgment for the plaintiff. *Ward vs. Reeder, (In Error.)* 2 *Harr. & McHen. Rep.* 145.

But in the case of *Ratvie vs. Sanders*, (2 *Har. & Johns. Rep.* 327.) where the defendant was in possession of, and holding a slave for the space of three years antecedent to the institution of an action of replevin against him for the slave;—*Held*; that the Statute of Limitations was a bar to the plaintiff's recovery, notwithstanding the property in the slave had been in the plaintiff, and the slave was by him loaned for an indefinite time to J. S., who, during that loan, sold the slave to the defendant; and although the suit was brought within three years from the time the plaintiff knew of such sale.

In replevin for a negro, where the Act of Limitations was relied on, the plaintiff, in order to prevent the operation of that act, proved by a witness that the defendant, after the institution of the suit, said "that if the negro did not belong to him, he did not want him, and no property he had was his, and that no law suit was necessary." A verdict was found, and judgment rendered for the plaintiff; and on appeal the judgment affirmed. *Quimby vs. Wroth*, 3 *Harr. & Johns. Rep.* 249.

The Act of Limitations may be pleaded in bar to an action against a common carrier for fraudulently embezzling goods committed to his care. *Cook vs. Darby*, 4 *Munf. Rep.* 444.

In an action against the defendant as a carrier, to which he pleaded the Statute of Limitations, the plaintiff offered to prove an *assumpsit* after the expiration of three years, which was opposed by

This form of action lies to recover damages for torts without

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the defendant's counsel; and the Court said; "An *assumpsit*, "after three years is not sufficient to take the case out of the Statute of Limitations against a carrier, it being founded on a *tort*." *Gallagher vs. Hollingsworth*, 3 Harr. & McHen. Rep. 122.

A suit by the party aggrieved to compel the defendant to discover and refund the usurious excess of interest which has been paid, is subject only to the general limitation of actions at law; the *Act for preventing Usury*, (Sess. 10. ch. 13. 1 N. R. L. 64.) contains no limitation to such a suit. The right of the party aggrieved, to bring an action *after* one year, may be lost, by the interference of the popular action given by the statute; but until such popular action has been commenced, and a right has attached in a third person, it seems, that the party may bring his action. *Palmer vs. Lord*, 6 Johns. Ch. Rep. 95.

If the captain of a ship insured, barratrously carries her out of the course of the voyage, procures her to be condemned in a Vice-admiralty court, sells her, and delivers her up to the purchaser, it is only from this last event that the Statute of Limitations begins to run as between the assured and the underwriter. *Hibbert & Al. vs. Martin*, 1 Camp. Rep. (N. Pri.) 539.

In an action against a sheriff, for the default of his deputy in taking insufficient bail, it was holden that the limitation of four years provided by the statute of 1796, c. 71. commenced only from the return of *non est inventus* upon the execution against the principal. *Rice & Al. vs. Homer*, 12 Mass. Rep. 127.

Until barred by the general Statute of Limitations, an action may be maintained against an officer, for falsely returning on an original writ that he had arrested the body of the defendant and had taken bail; and the plaintiff in such action is not bound to shew a demand of the bail bond within a year from the judgment. *Cæsar vs. Bradford*, 13 Mass. Rep. 169.

In an action against the sheriff for an insufficient return upon an original writ, by reason of which the judgment rendered in that suit for the plaintiff was reversed, it was holden that the Statute of Limitations began to run from the time of the said return, and not from the reversal of the judgment. *Miller vs. Adams*, 16 Mass. Rep. 456.

The right of action against a sheriff, for taking insufficient bail, commences upon the sheriff's return of *non est inventus* upon the execution against the principal, and the Statute of Limitations



force, where the injury is consequential, and not immediate.

begins to run from that time; and after six years the action is barred. *Mather vs. Green*, 17 Mass. Rep. 60.

In an action against certain persons who were the president and directors of the *Berkshire* bank, and by whose misconduct it was alleged the bank had failed, and had thereby caused a consequent loss to the plaintiff, who was the holder of certain bills of the said bank: WILDE, J., who delivered the Opinion of the Court, said; "But it is said, that the Statute of Limitations is not applicable to demands on bank notes; and perhaps there can be no doubt that such is the law, where the action is brought against the corporation: because the circulation of such notes is daily renewed; and because lapse of time is no presumption of payment, these notes never being paid, unless given up by the holder at the time of payment. But where the action is brought against the directors, and is founded on their supposed malfeasance or negligence, there can be no distinction that we can perceive in the application of the Statute of Limitations, between such a case and any other special action on the case." *Hinsdale vs. Larned & Al.* 16 Mass. Rep. 65. 68.

If a statute directs that an action shall be commenced within six months after the matter or thing for which such action shall be brought, and in consequence of the cutting of a trench a fall of rain causes the plaintiff's land to be overflowed, first within six months, and again after six months from cutting the trench, whether the action must be brought within six months from the cutting of the trench, or within six months from the perception of the first prejudicial effect, or whether it may be brought within six months from the last injury, Quære. *Sutton vs. Clark*, 6 Taunt. Rep. 29. S. C. 1 Marsh. Rep. (Eng. C. P.) 429.

But in *Gillon vs. Boddington*, (1 Carr. & Payne's Rep. 541.) it was Held, That the limitation ran from the time of the consequential injury happening, and not from the doing of the act which caused that injury, where the act itself was not tortious or injurious, except from those consequences which occurred some time after. & Vide *Sutton vs. Clarke*, 1 Marsh. Rep. (Eng. C. P.) 429.

An information in the nature of a writ of *Quo Warranto*, though in form a criminal proceeding, yet is in substance a civil proceeding, for the trial of a civil right; and, therefore, the act which limits the prosecution of informations on any penal law to one year, does not apply to such informations. *The Commonwealth vs. Birchett*, 2 Virg. Cas. 51.

The statute of limitations, therefore, runs not on the committing of the act, but on the injury that follows ; for the act itself is not actionable till the consequence has made it so, and the time only runs from the accruing of the cause of action.[2] But if the

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In an action on the case, for erecting a dam across a stream of water, whereby the plaintiff's lands were overflowed, the Court decided, "that the fifteen years [*the period of limitation*] ought "to be computed, commencing at the time when the plaintiff's "lands were first flowed, or received actual injury." *Hurlbut vs. Leonard, Brayt. Rep.* 201, 202.

A Court of Chancery will not compel a person to discover what may subject him to a penalty or forfeiture. And it makes no difference, that the Statute of Limitations has run against such penalty or forfeiture. *Northrop vs. Hatch, (In Error.) 6 Conn. Rep.* 361.

[2] In an action of detinue, it was *Held*, that if slaves are *lent*, subject to the demand of the lender when he pleases, the Statute of Limitations does not begin to run (as between the parties) until demand and refusal. *Gillespie vs. Gillespie's heirs, 2 Bibb's Rep.* 92.

In the case of *McDowell vs. Hall, (2. Bibb's Rep.* 610.) there was an absolute bill of sale in the hands of the vendee, and a conditional defeazance and stipulation in the hands of the vendor ; it was *Held*, that both were to be taken together as one contract ; and that the conditional defeazance having suspended the right of the vendee to take possession until the death of the vendor, the Statute of Limitations did not begin to run from the date of the bill of sale, but from the *death* of the vendor.

In the case of *Berry's Administrators vs. Pullam, (1 Hayw. Rep.* 16.) it was ruled by the Court upon argument, "That the "Act of Limitations will not run, where A. detains the chattel of "B., but only from the time when B. knows where the chattel is, "and the same is adversely claimed. *Vide 3 Rep.* 79. b." *Vide Elwick's Ex'ors. vs. Rush, 1 Hayw. Rep.* 28.

In the case of *Ellmore vs. Mills, (1 Hayw. Rep.* 359, 360.) one point was, Whether the plaintiff was barred by the Statute of Limitations ? The negroes, (for the recovery of which the suit was brought) had been in the possession of one Jordan, who claimed them as his own, from Christmas, in the year 1785, when he brought them to this state [*North Carolina*] and sold them to

cause of action be grounded upon a record, or arise *ex maleficio*, it is not within this statute.[3]

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Mills, against whom no action was commenced till the month of March, 1793. THE COURT said; "The Act of Limitations began "to run from the time the negroes came into the possession of the "defendant, unless he was entrusted with them by the plaintiff for "an indefinite time; for then the act will not begin to run till "demand made, or unless the plaintiff can shew that the defend- "ant removed himself to such places where the plaintiff could "not find him to institute his suit, or had the negroes without the "knowledge of the plaintiff." Verdict and judgment for the de- fendant

H. exhibits his bill in Chancery against J. and P. alleging that J. gave his bond to H. which he deposited with P. for *safe keeping*; that he has never received the bond or the money; that J. pretends he paid the money to P.—The bill prays a discovery, and that J. or P., one or the other of them, may be ordered to pay H. the money. The defendant P. denies the allegations of the bill and sets up the *Statute of Limitations*. Held, That the Sta- tute of Limitations is a good bar to the relief sought against P. *Brink vs. Brink*, 1 *Bibb's Rep.* 255.

A bill in Equity for the recovery of a slave, ought not to be sub- stituted in lieu of an action at law to enforce a mere legal right; and if it is, the Statute of Limitations will bar it as much as it would a suit at law. *Wright vs. Wright*, 2 *Litt. Rep.* 8.

[3] An action on the Statute, to recover *damages*, for a forgery, is not barred in one year by the Statute of Limitations. *Ross vs. Bruce*, (*In Error*.) 1 *Day's Rep.* 100.

In the case of *Thompson & Al. vs. Wagner & Al.* (3 *Dessaus. Eq. Rep.* 105.) the COURT said; "The next part of the complaint "is that he [*the defendant*,] ought as master to have procured "payment of Moultrie's Bond. The defendant has pleaded the "Statute of Limitations, and this plea is sufficient to protect him. "There are many cases in which the Court would consider the "master as not entitled to the benefit of this Statute; but this case "is not of that class. The complainants themselves are subject "to the imputation of laches, for the transactions of which they "complain, took place, some of them as far back as in 1785, and "their bill was not filed until 1806. The Court cannot relieve "them."

In an action (a) against a sheriff, for such a sum of money upon a *fiery facias*, at the suit of the plaintiff, and did not bring the money into court at the day of the return of the writ, *per quod deterioratus est et damnum habet, &c.* the defendant pleaded the statute of limitations, to which the plaintiff demurred. The court gave judgment for the plaintiff, *nisi causa, &c.* If the *fiery facias* had been returned, the action would have been grounded upon the record, and it is the sheriff's fault that the writ is not returned; but, however, the judgment in this court is the foundation of the action.

\*Debt upon the statute of 2 Edw. VI. c. 13. for not setting out tithes, is not within the statute, for *oritur ex maleficio*: so the ground of this action is *maleficio*, and the judgment here given; in both respects it is not within the statute of limitations.

(a) 1 Mod. 240.

In an action of deceit for selling as sound an unsound negro, the cause of action accrues on the sale—not on the death of the negro; and the Statute of Limitations begins to run from the sale. *Singleton vs. Lewis; Hardin's Rep.* 258.

In an action on the case against a Sheriff for the escape of a person arrested by him on a *capias ad respondendum*, he pleaded the Statute of Limitations, but the court gave judgment for the plaintiff, that the act of limitations could not be pleaded in this action. *French vs. O'Neale, (In Error.)* 2 Harr. & McHen. Rep. 401.

On the sale of a slave by a person having no title, and without warranty, no recovery is necessary to give to the vendee his action; the right to sue originates in the *deceit*, and the Statute of Limitations runs from the day of the sale. *Scott & Al. vs. Scott's Admr.* 2 Marsh. Rep. (Ky.) 218.

Prescription in redhibitory actions runs from the time the defects in the slave are known to the purchaser. *Reynaud & Sucko vs. Gnillotte & Boisfontaine*, 1 Mart. Rep. N. S. 227.

Actions to set aside contracts as fraudulent must be brought within one year from the time the fraud was discovered. *Syndics of Weimprender vs. Weimprender*, 2 Mart. Rep. N. S. 591.

The statute enacts, that the action *sur trover* shall be commenced and sued within the time and limitation after mentioned; but in the perclose, *trover* is omitted; from which it has been contended, that *trover* was not within the statute of limitations, but was omitted. But all the court, in the case<sup>(a)</sup> wherein the objection was taken, conceived, that although actions of *trover* are not mentioned in the perclose, yet, the words being, that "actions upon the case shall be brought within six years, and actions for words within two years;" in those general words of actions upon the case, the action of *trover* is implied.

And the time within which an action of *trover* must be commenced, is six years from the accruing of the cause of action, [f]

(a) Cro. Car. 246.

[1] Goods were taken on an execution, which was afterwards set aside for irregularity; an action of *trover* was brought and the defendant pleaded the Statute of Limitations. SPENCER, J. *delivering the Opinion of the Court*, said; "The execution issued in favour of *Smith and Tater*, against the plaintiff, being admitted to be irregular, and unexplained, is to be considered as void. The plaintiff's action, therefore, accrued when the goods were first taken; and the plaintiff, having delayed to bring a suit within six years from the time of the trespass, is undoubtedly barred by the Statute." *Read vs. Markle*, 3 Johns. Rep. 523. 525.

In an action of *Trover* for a *United States* certificate of £41, payable to bearer, brought *March term*, 1793, and laying the conversion on 1st October, 1794, the defendant pleaded the Statute of Limitations, and the general issue. It appeared that in a suit before a Justice of the Peace, in *September*, 1785, Judgment had been given against *Horsefield*, the present plaintiff, for £3 5s. 10d. — *Cost*, the present defendant, became security for this debt, and *Horsefield*, having left the country, the Justice, about a year after the judgment, at the desire of *Cost*, who had this certificate of *Horsefield* in his hand, issued an execution, on which *Cost* gave up the certificate to the constable, for sale, who after the usual notice, sold it to *Cost* for £5. The sale was open and fair, and the price supposed reasonable. No demand of the certificate was made of *Cost*, till *January*, 1793, when demand was made by *Horsefield's* attorney. *Cost* refused to give it, saying he bought it at a Constable's sale, and that *Horsefield* was yet in his debt. Together with the demand, an offer was also made to pay *Cost* the debt due to

which is on the conversion;(a) for any man may take the goods

(a) 3 Comm. 153.

him from *Horsefield*. In his charge to the jury, the PRESIDENT of the COURT said; "Demand and refusal is not a conversion, it is but evidence of a conversion, of which there may be other evidence. Though demand and refusal be frequently the only evidence that can be given of conversion, yet if conversion can be proved without proving demand and refusal, they need not be proved. The conversion here was at the time of the sale. Since that time, the plaintiff has suffered more than six years to elapse, without bringing an action; and this action now brought, after six years, is therefore barred by the Statute of Limitations; and you must find for the defendant. The jury found for the defendant accordingly. *Horsefield vs. Cost*, *Addis. Rep.* 152.

In an action of trover for a horse, issues were taken upon the pleas of *not guilty*, and the *Statute of Limitations*, and the court, on rendering judgment for the defendant, said; "Upon the plea of the Statute of Limitations, the Court are clearly of opinion, that the period from which the Statute begins to run, is the first moment of the possession by the defendant, if the use was not lawful; and that the plaintiff is not permitted to assume as the period any point of time during the continuance of the possession in the defendant." *White vs. Edgman*, 1 *Tenn. Rep.* 19. 22.

The Statute of Limitations is a bar to an action of trover, commenced more than six years after the conversion, although the Plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud in order to prevent the plaintiff from obtaining that knowledge at an earlier period. *Granger vs. George*, 5 *Barnew. & Cress. Rep.* 149.

In an action of trover for a negro, of whom the plaintiff had quiet and uninterrupted possession for more than four years, it was *Held*, that four years possession of a negro or other chattel will give a title to the possessor, and the Statute of Limitations will bar any other claimant from a recovery. *Cookfield vs. Hudson*, 2 *Bay's Rep.* 425. *Same point*, *Cholett vs. Hart*, *Ibid.* 156.

Five years adverse possession of a slave in Virginia gives a good title upon which trespass may be maintained. *Brent vs. Chapman*, 5 *Cranch's Rep.* 358. *Thompson vs. Caldwell*, 3 *Litt. Rep.* 136. *Blakey vs. Newby's Admrs.* 6 *Munf. Rep.* 70.

Five years peaceable and uninterrupted possession of slaves, under a loan not evidenced by deed duly recorded, vests a title

of another into possession if he finds them; but no finder is allowed to acquire a property therein, unless the owner be forever unknown: and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner; for which reason, such refusal alone is, *prima facie*, sufficient evidence of a conversion.

So, where the plaintiff, in his declaration, (a) stated, that 1st March, 21 Jac. I. he was possessed of a ship, and  
 [\*98] \*nine pieces of ———, and the same day lost them, which came to the defendant's hands; who, 3d October, 3 Car. I. converted them to his own proper use. The defendant pleaded the statute of limitations, and that the 20th March, 19 Jac. I. *causa actionis accrevit*; so as not only three years and more were incurred since the parliament, but also six years after the conversion, before any action commenced.

(a) Cro. Car. 245.

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in the loanee, which enures in favour of his creditors, and cannot be divested *as to them*, by his returning the same to the lender, after the said five years have expired. *Garths' Executors vs. Barksdale*, 5 Munf. Rep. 101.

But in the case of *Gaunt vs. Brockman*, (*Hardin's Rep.* 331.) it was *Held*, that, Former possession of slaves, though continued long enough to protect the holder against an action, cannot vest a right, so as to enable such holder, when deprived of the property, to maintain an action thereupon. *Sed vide Thompson vs. Caldwell*, 3 Litt. Rep. 136. (*In Chancery*.) CONTRA.

Under the Act of 1806 [*North Carolina*] three years adverse possession of a Slave only barred the remedy of the legal owner, but gave no title to the possessor. *Executor of Lynch vs. Ashe*, 1 Hawk's Rep. 338.

Slaves, belonging to infants, on their death without issue, vest in the brothers and sisters, not in the mother. But if under a mistake of the Law, a division of such slaves be made, and a part be allotted to the mother, who holds them for a longer term than five years, (the brothers, &c. labouring under no disability,) the Act of Limitations will protect her title. *Lytle & Al. vs. Rowton*, 1 Marsh. Rep. (Ky.) 519.

The plaintiffs replied, that they were possessed of the said ship as of their proper goods; and so being possessed before the 20th March, 19 Jac. I. viz. 1st March, 19 Jac. I. they agreed at London aforesaid, *in parochia et warda predicta*, that the said defendant, as their servant, should transport the said ship and goods to T. in Spain, being parts beyond seas, and should afterwards restore them to the plaintiffs upon request; whereupon the defendant, taking the said ship the said 1st March, 19 Jac. I. transported her to the parts beyond seas, viz. to T—, and 20th March, 19 Jac. I. there sold the said ship and goods to persons unknown, and converted them to his proper use: and that the defendant, after the said conversion, remained *in partibus transmarinis usque* 1st May, 1 Car. I. by reason of which stay they could not sue him *per legem terræ*: and that 1st May, 1 Car. I. he returned; whereupon, the 1st October, 3 Car. I. at London, they required him to deliver the said ship and goods, which to do he refused, but the said ship and goods, *ad tunc et ibidem*, converted and disposed *prout superius continatur*: to which the defendant demurred.

And it was a question, if this request and non-delivery after his return, be not a new conversion and cause of \*action, so that although he was barred before by the [\*99] statute of limitations, whether he should not be hereby restored to that action? And Jones and Whitlocke conceived that he should, and that it may be well intended the goods came into his hands again after his sale, and the demanding them of him, and his denial and conversion, is good cause of action; but Croke doubted thereof.

This was again moved,<sup>(a)</sup> when Richardson, Jones, and Berkeley held, that when it is alleged that the defendant returned from beyond seas, 1 Car. I. and that the plaintiff, 3 Car. I. required the redelivery, and he refused; and afterwards, the same 1st October, 3 Car. I. converted them to his proper use; it

(a) Cro. Car. 333.



- shall be intended, that the said goods came a second time to the defendant's hands; and that they being in his hands, the plaintiff required the delivery of them; and that afterwards, the same day, he converted them, and that upon this conversion the plaintiff had grounded his action, and the plaintiff had election upon which conversion he would bring his action; and then he is clearly out of the said statute of 21 Jac. I. c. 16. the action being brought within two years after the last conversion, and so well brought. But Croke doubted how this action should be maintained, without showing how they came to the defendant's hands, where it is allowed that once he sold them, in 19 Jac. I. and converted the money to his proper use; and the allegation that he after refused to deliver, and converted them to his proper use, without showing how he came to them, could not be good. But the other three Justices [ \*100 ] \*being against him, they gave rule that judgment should be entered for the plaintiff.

So, where an executor, (a) several years before, had left some household stuff in the house, by the consent of the heir, who used them afterwards; and within six years of the action brought, the executor demanded the goods, and the heir refused to let him have them; whereupon trover was brought, and the statute of limitations pleaded. It was held by the court, that the user before the demand was no conversion, nor evidence of it; for it was with the consent of the executor till then: and the demand being within six years, the refusal which ensued it, and is the only evidence of a conversion in the case, was within six years; and if a trover be before six years, and a conversion after, the statute cannot be pleaded.

Which construction, as far as its principle goes, would perhaps rule the time from which the statute should run in actions \*for negligence against persons on retainer, where the negligence

complained of is in some transaction of more than six years' standing, but the damage to the plaintiff within that time.[1]

In such an action(a) against an attorney, the negligence imputed to him by the declaration was, that an annuity having been granted to the plaintiff, he had been employed as his attorney to prepare the securities, and to enrol the memorial. It then charged, that he had so negligently and improperly caused the memorial to be enrolled, that by reason of a defect in such memorial, the securities had been set aside by rule of court, and the \*plaintiff had lost the benefit of his an- [ \*101 ] nuity, and the money paid for the same. The defendant pleaded, first, not guilty; and, secondly, the statute of limitations, that the cause of action did not accrue within six years. The plaintiff had assigned the annuity to one Kirkby. The annuity had been set aside; and Kirkby had brought an action

(a) 4 Esp. 18.

[1] In the case of *Howell vs. Young, Gent. one, &c.* (5 Barnew. & Cress. 259;) it appeared at the trial, that in the year 1814, the defendant had been retained by the plaintiff to ascertain whether a certain warrant of attorney and mortgages were a sufficient security for the sum of £3000 and interest, and that at the time he represented they were so; and in consequence of such representation the plaintiff lent that sum of money, on that security. In the year 1820, (the interest to that time having been regularly paid,) it was discovered that the warrant of attorney and mortgages were not a sufficient security: Held, That the misconduct or negligence of the Attorney constituted the cause of action, and that the Statute of Limitations began to run from the time when the defendant had been guilty of such misconduct, and not from the time when it was discovered that the securities were insufficient. In giving his opinion BAYLEY, J. said, "It appears to me that there is not any substantial distinction between an action of *assumpsit* founded upon a promise which the Law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly upon a breach of duty. What ever be the form of action, the breach of duty is substantially the cause of action." And HOLROYD, J. said, "I think it makes no difference in this respect, whether the plaintiff elects to bring an action of *assumpsit* founded upon a breach of promise, or a special action on the case founded upon a breach of duty." & vide 2 Carr. & Payne's Rep. 238. Same case.

against the plaintiff for the consideration money, which he had recovered back: this had taken place within six years.

Lord Kenyon said, as to the plea of the statute of limitations, he had not made up his mind on it; but the inclination of his opinion was, that the plea was insufficient: that in the case of an action of trover, if goods are left in the hands of another, the statute of limitations does not begin to run from the time of delivery, but from that of the demand and refusal.[1]

Slander of title is not within the limitation of actions for slanderous words, because it is not actionable unless a special damage have arisen; and the limitation of two years on slanderous words applies only to words actionable at the time of speaking them.

Error of a judgment in *Windsor*,<sup>(a)</sup> in an action on the case for slander of title. The plaintiff declared that he was seised in fee of lands, and the defendant said he had no title. And the error assigned was, that he did not show by his declaration, that by the occasion of those words he had any prejudice.

[\*102] \*The court agreed, that the declaration was not good, and so the judgment erroneous, because the action is not maintainable, without showing special prejudice, no more than for calling one whore or bastard, without showing special cause of temporal damage; and was not like

(a) *Crag Car.* 140.

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[1] In an action of *indebitatus assumpsit*, for money had and received, it was *Held*, that where the Legislature, with the assent of a town, has granted a portion of the avails of the School Lands in such town, to another town, an action will not lie to recover such portion, until after demand made, and consequently, until demand, the Statute of Limitations does not begin to run against the right of action. *The town of Poultney vs. The town of Wells*, 1 *Aik. Rep.* 180.

words spoken which imply slander and temporal loss, as thief or bankrupt, or such like. But slandering of one's title does not import in itself loss, without showing particularly the cause of loss, by reason of the speaking the words, as that he could not sell or let the lands; but being general words they are not sufficient: and that it was out of the statute, as well for the time of limitation as for the costs. Nor is *scandalum magnatum* (a) within the statute.

"In all actions upon the case for slanderous words, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same."

The following cases will exemplify the principle that regulates the construction in actions for words, both as to the time and limitation of costs. In those cases in which no more costs than damages are given, the time of limitation is two years: where full costs are allowed, although the damages be under forty shillings, the action is out of the limitation of two years, but still within the limitation of six years; which runs from the time of the consequential injury.

\*In an action (b) for words, for calling the plaintiff a [\*108] thief, and for procuring him to be indicted and imprisoned for felony, until he was acquitted. Upon not guilty pleaded, it was found for the plaintiff, and ten shillings damages; (so under forty shillings.) It was moved, that he should have but ten shillings for costs; but the court conceived, forasmuch as this was not an action for words only, but also an action upon the case, in nature of a conspiracy, and the defendant

(a) 1 Sid. 415.

(b) Cro. Car. 163.

was found guilty of both, he shall have judgment for his ordinary costs, and that it was out of the statute.

So, where the declaration(a) charged that the defendant, *falso et malitiose*, spake of plaintiff these words, "that the plaintiff committed felony," and procured him to be arrested for felony, and to be imprisoned for three days: the defendant pleaded not guilty, and found against him generally, and damages to twenty shillings. It was moved that he might have no more costs than damages, the damages being under forty shillings. But because there was a precedent shown in the above case of *Edwards v. Topsall*, it was resolved here to be out of the statute.

But where the plaintiff(b) counted that he was a clerk of the enrolment office, and the defendant *crimen felonix ei imposuit*, by which he had liked to have lost his office; the defendant pleaded, that as to the imposition of felony, otherwise than by speaking of scandalous words, not guilty; and as to the speaking of the words, *non infra duos annos*; to which the plaintiff demurred.

[ \*104 ] \*On the trial, Wild, for the plaintiff, said that this was not within the statute of limitations no more than slander of title. Jones, for the defendant, said, that the imposition of felony is actionable by itself, and then the other words are within the statute. Wild answered, that *crimen felonix imponere*, cannot be by words alone, but by some act, as carrying him before a justice of peace, &c. Twissden, J. If the words were actionable at first, then the damages after do not give cause of action; and the first plea is a bar, and the other fruitless; and of that opinion was the whole court; and judgment was given for the defendant.

In an action on the case(c) for words spoken of the wife by

(a) Cro. Car 396. (b) Raym. 61. (c) Ld. Raym. 831.

the defendant, viz. "Mrs. Brown is a whore, and has done as all whores do;" *per quod* the plaintiff, being a tradesman, lost such and such, viz. A, B, &c. from being his customers, who were his customers before, &c. Upon not guilty pleaded, the defendant at *nisi prius* gave evidence by way of mitigation of damages, that Mrs. Brown was a whore. And the evidence was very strong; upon which the jury gave damages but twenty shillings to the plaintiffs. And it was moved that the plaintiffs might have their full costs; which was opposed by Serjeant Darnall. And the court held, that this action was not an action for slanderous words within the meaning of the statute, because the special damage is the gist of the action, without which it would not lie: and therefore such an action lies for the husband alone, without joining the wife, which is otherwise in a common action for words. And *Law v. Horwood*, Cro. Car. 140. was cited, and allowed by the court to be a case in point.

\*And Powell, Ch. J. said, that if the master brought [\*105] an action of battery against J. S. for a battery committed upon his servant, *per quod servitium amisit*, if the jury, upon not guilty pleaded, gave damages under forty shillings, the plaintiff should have full costs, notwithstanding the statute of 22 & 23 Car. II. c. 9. which allows, in common actions of battery, no more costs than damages, where the damages are less than forty shillings. And the plaintiff in the principal case had full costs.

And by the court, in *Phillips v. Fish*,<sup>(a)</sup> which was an action on the case for these words, spoke of the plaintiff, viz. "Thou art a villain and thief;" *quorum quidem verborum propretatione*, the plaintiff was not only much damnified in his fame and reputation, *verum etiam arrestat fuit*, by procurement of the defendant, and carried before a justice of the peace, and there imprisoned. If the fact that comes under the *verum etiam* was only laid in aggravation of damages, so that the words are the git of the action, then the plaintiff can have no more costs than dam-

(a) 8 Mod. 372.

ages; but if it be laid as a distinct fact, for which another action might be brought, then he shall recover full costs. Actions of *scandalum magnatum*, and for slandering a man's title, are actions for words, and yet not within the statute of 21 Jac. I. c. 16. for the statute intended only to prevent frivolous actions for words. It is true, where a trespass is laid with a *per quod*, &c. as for instance, "*per quod servitium*," &c. or "*per quod consortium uxoris amisit*," there, whatever comes under the *per quod* must be proved, otherwise the plaintiff cannot have a [\*106] verdict, because that is the gist of the action. But \*in the principal case, the action is founded on the words spoken, and the procuring the plaintiff to be arrested for felony is laid in a different count, and the defendant is found guilty generally; the court therefore inclined that the plaintiff should have full costs.

So, where the declaration(a) went on *quorum quidem falsorum verborum propalationis prætextu idem. Carolus non solum in bonis, nomine, et in negotiis suis honestis, multipliciter læsus et deterioratus existit, verum etiam occasione verborum prædictorum per procuratorem* of the defendant, he was taken up and carried before a justice; (the words charging him with stealing a hen;) there was a verdict for the plaintiff, and one shilling damages; and it was moved in Trinity term, 12 Geo. I. for full costs: and by the opinion of the court, that the plaintiff should have full costs, because this was not laid as an aggravation, but as a distinct fact; he spoke the words, and he procured him to be carried before a justice.

But in an action(b) for words, the plaintiff set out in his declaration, that he was a house-smith by trade, and that the defendant spoke the words of him, (which words were actionable in themselves,) by reason of the speaking of which words the plaintiff had lost several customers, naming them particularly, to his damage of 100*l*. On the general issue pleaded, the jury

(a) Str. 645. •

(b) *Ld. Raym.* 1538.

found for the plaintiff, and gave him only five shillings damages. And it was moved, that the plaintiff might have full costs, though the damages were found under forty shillings; because he had received a special damage, viz. the loss of his customers; so that if the words had not been actionable of themselves, this action would have been maintainable, [\*107] by reason of the special damage. And the two cases between *Phillips and Fish* and *Carter and Fish* were cited. But, *per Curiam*, Where the words are not actionable, but the action is maintained by reason of special damages the plaintiff has sustained upon account of the words, the plaintiff shall have full costs, though the damages are under forty shillings; for it is not the words, but the special damage is the cause of the action. But where the words are actionable of themselves, as in the present case, and special damages are laid by way of aggravation, and damages are under forty shillings, there shall be no more costs than damages, for that is properly an action for words within the statute of 21 Jac. I. c. 16. And as to the cases cited of *Carter v. Fish* and *Phillips v. Fish*, upon considering that declaration the court held, that as it was laid, it was not barely laid in aggravation of damages, but was a distinct cause of action, importing *crimen feloniaci imposuit*, and therefore the plaintiff there had full costs. In this principal case the court directed the plaintiff should have no more costs than damages.

In the case of *Surman v. Shelleto*,<sup>(a)</sup> Mr. Harvey made a motion for full costs; though the jury had found only one shilling damages, they had given forty shillings costs. It was an action for words: and there was a *colloquium* laid about the plaintiff's trade; and also a special damage laid, of his having lost his business by reason of the speaking of the words. The words in question were contained in the third count, on which third count the verdict was taken; and they were these: "Thou art a rogue, and thou hast cheated me of several pounds." The rule, he said, was, "that where [\*108]

(a) Burr. 1688.



the words are not actionable in themselves, there shall be full costs, if special damages are laid; though the damages found be under forty shillings." And to show that these words are not in themselves actionable, he cited Hardr. 8. *Wake v. Chapman et Ux.* and 5 Mod. 398. *Savage v. Robury*. Indeed, if the words spoken are in themselves actionable, and less damages found than forty shillings, there shall not be full costs except there be a *colloquium*, and special damages laid as a substantive and independent injury. But the court held the latter words, "thou hast cheated me of several pounds," to be actionable; and told Mr. Harvey he must be content with forty shillings costs.

Case for words.(a) The declaration stated, that at a public auction, on the 29th April, 1775, a small glass bottle being missing, the defendant said, first, "That man [pointing to and meaning plaintiff] has put one in his pocket. I saw him take it: he has got it"—meaning to impute to plaintiff that he had feloniously stolen it. Secondly, that he said, "That man has put one in his pocket. I saw him take it; and he has got it." Thirdly, that the words were, "I saw him take it:" by means whereof he was publicly searched, and exposed to great disgrace; and one John Woolgar, and others, have since refused to trust the plaintiff. On not-guilty and issue thereon, a general verdict was for the plaintiff. Damages, one shilling.

Davy moved that the prothonotary, should allow full costs. He agreed the rule to be (as laid down in *Burry v. Perry*, [\*109] 2 Ld. Raym. 1588. and recognised by two cases \*in Barnes, 18 and 25 Geo. II.) that where there are special damages laid in the declaration, and the words are in themselves actionable, then, if the jury find a verdict for less than forty shillings, there shall be no more costs than damages; for the special damage is only laid as a matter of aggravation, and not as the cause of action. But if the words are not in themselves actionable, then the special damage is the only cause of

action; and that will carry full costs, of whatever amount the verdict may be. In the present case, he allowed the words in the first count to be actionable, as imputing the crime of felony: but those in the second or third count, not being laid as a charge of felony, are not actionable. And this being a general verdict, some of the damages must be intended to be given upon each of those counts, which (though it be but a farthing) would carry costs, as it could only be given for the special damage.

Walker, for the defendant, insisted on the same rule, and that all the words in every count were equally actionable, being all under the same introduction and conclusion.

And of that opinion was the court, (absente De Grey, Ch. J.,) that all three sets of words being under the same introduction, stating the good character of the plaintiff, and the intent of the defendant to cause him to be suspected of stealing, and being under the same conclusion, were all equally actionable.

And, by Gould, J. that the distinction, as stated by Davy, between words actionable and not so, with regard to their carrying costs, when coupled with special \*dam- [ \*110 ] ages, and the verdict under forty shillings, was a clear and settled distinction: there must be no more costs than damages.

Blackstone, J. said, that he must yield to the weight of authorities which had settled this distinction, though he thought it was too artificial and refined. In his own plain understanding he could only conceive, that the smallness of the damages ought to exclude full costs, even though the plaintiff complained of a special injury, whether the words are actionable or not; and therefore he had no scruple in discharging the present rule. But he could not so well reconcile it to his own mind, that, *ceteris paribus*, the plaintiff should recover full costs if the words be innocent, but not so if they are highly scandalous.

Nares, J. said, the rule was certainly as stated by Davy at the bar, and then by his brother Gould, therefore the rule was discharged.

Trespass is within the words of the statute. With respect to trespass to lands, it is enacted, that in all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends before the action brought: whereupon, or upon some of them, the plaintiff shall be enforced to join issue; and if the issue be found for the defendant, or the plaintiff shall be non-  
[ \*111 ] suited, the plaintiff shall be clearly \*barred from the said action or actions, and all other suit concerning the same.

Trespass *quare clausum fregit*, and to personal property, must be brought within six years: the statute; therefore, may(a) be pleaded to trespass for mesne profits, and the defendant may by that mean protect himself from all but the last six years.[1]

(a) *Ran. Eject.* 444.

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[1] In the case of *Murphy vs. Guion*, (2 *Hayw. Rep.* 145.) TAYLOR, J. delivering the Opinion of the Court, said; "The action for mesne profits does not accrue till after a recovery in ejectment, and possession obtained: then the defendant by relation, is a trespass against the plaintiff's possession *ab initio*; consequently, if the action be commenced within three years after that time, the act of Limitations will not bar." & vide same case, *Ibid.* 162, the like Opinion by JOHNSTON, J. & vide *Murphy vs. Guion's Executors*, 1 *North Car. Law Rep.* 95, the like Opinion by HALL, J.

In the case of *Pitman vs. Casey*, (2 *Hayw. Rep.* 293,) TAYLOR, JUDGE delivered the Opinion of the Court in the following terms; "The trespass complained of first commenced above three years before the institution of this action, and has been continued to the time of the action, which was within three years. The act

And trespass to persons must be brought within four years of the trespass committed. But when the trespass has been continued many years, and the statute of limitations pleaded, the jury gives damages only for the time within the statute.

In an action (a) for an assault, and imprisoning plaintiff from 10th August, 24 Car. II. until 2d October, 1 Jac. II. the time of exhibiting the bill, to which the statute of limitations was pleaded, and found for the plaintiff, with entire damages: two exceptions were moved in arrest of judgment; first, that a verdict cannot help what appears to be otherwise upon the face of the record. Now, here the plaintiff declared, that he was imprisoned the tenth of August, 24 Car. II. which was thirteen years before; and being one entire trespass, the issue is found as laid in the declaration; which cannot be for so many years between the cause of action and bringing of the writ; for if a trespass be continued several years, the plaintiff must sue only for the last six years, (b) for which he hath a complete cause of action; but when those are expired, he is barred by the statute. Secondly, when the plaintiff has any cause of action, then the statute of limitations \*begins; as in an action [\*112] on the case for words, if they be actionable in themselves, without alleging special damages, the plaintiff will recover damages from the time of the speaking, and not according to what loss may follow. So in trover and conversion,

(a) 3 Mod. 111.

(b) The plea in this case was bad, being "Not guilty within six years," whereas it should have been, "Not guilty within four years."

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"of Limitations is pleaded;—and most clearly that act is a bar to the action; for it must be founded upon the first tortious entry; not upon any continuance of possession afterwards, and within three years. Before an action of trespass can be maintained for continuing in possession after the first entry there must be a regaining of the possession by the party expelled. Then the Law deems the possession to have been his all along; and of course that the defendant was a violator of it every moment he continued his possession." Upon this opinion the plaintiff was nonsuited.

when there is a cause of action vested, and the goods continue in the same possession for seven years afterwards; in such case it is the first conversion which entitles the plaintiff to an action. So in the case at bar, though this be a continued imprisonment, yet so much as was before the writ brought is barred by the statute.<sup>(a)</sup>

On the other side it was contended, that the verdict is good, for the jury reject the beginning of the trespass, and give damages only for that which falls within the six years; and this may be done, because it is laid *usque exhibitionem billæ*. If the defendant had pleaded not guilty generally, then damages must be for the thirteen years, though the plaintiff, on his own showing, had brought his action for a thing done beyond the time limited by the statute; but having pleaded "Not guilty at any time within six years," if the verdict find him guilty within that time, it is against him. Secondly, as to the objection, that the cause of action arises beyond six years, though it do appear so in the declaration, yet that doth not exclude the plaintiff, for there might have been process out before, or he might be disabled by an outlawry, which may now be reversed; or he might be in prison, and newly discharged; from which time he hath six years to begin his action; for being under any of these circumstances, the statute does not hurt him.

[\*113] \**Curia*.—If an action of false imprisonment be brought for seven years, and the jury find the defendant guilty but for two days, it is a trespass within the declaration. This statute relates to a distinct,<sup>(b)</sup> and not to a continued act, for after six years it will be difficult to prove a trespass: many accidents may happen within that time, as the death or removal of witnesses, &c. Judgment was given for the plaintiff.

And trespass, with consequential damages, is within the statute, though it has not yet been settled whether the limita-

(a) 3 K&B. 673.

(b) 3 K&B. 673.

tion be six or four years; but either way is well enough on general demurrer.

The plaintiff complained of a plea of trespass,<sup>(a)</sup> and stated that the defendant on 1st January, 1792, and on divers other days, &c. at, &c. with force and arms made an assault upon G. the plaintiff's wife, and then and there seduced her, &c. whereby the plaintiff, during all the time aforesaid, lost and was deprived of the comfort, society, and fellowship of his said wife, and of her aid and assistance, &c. and other wrongs to the plaintiff the defendant did, against the peace, &c. and to the damage of the plaintiff of 20,000*l.* Pleas: first, not guilty of the premises; second, not guilty of the premises at any time within six years next before the exhibiting of the plaintiff's bill. Replication joining issue on the first plea, and demurring generally to the second; joinder in demurrer.

In support of the demurrer it was contended, by Wood, that the statute of limitations could not be pleaded to an \*action of trespass for an assault and consequential [\*114] damage, but that it was confined to trespass *quare clausum fregit*, or trespass for taking goods, which must be brought within six years after the cause of action, or to trespass for an assault and battery, &c. which must be brought within four years, and is confined to such actions brought by the party personally injured. That according to a MS. case of *Cook v. Sayer*,<sup>(b)</sup> with which he had been furnished, the court, in deciding the demurrer to the plea of the statute of limitations, considered the action as an action on the case, and not of trespass, which was a mistake, and was so noted to be in *Batchelor v. Biggs*.<sup>(c)</sup> He then read the following note:—" *Cooke v. Sayer* was an action brought by the husband against the defendant for criminal conversation with his wife. Plea, not guilty within six years, to which there was a demurrer. The question was, if the action were trespass and assault, or case? If the former,

(a) 6. East. 389.

(b) 2 Wils. 85.

(c) 2 Bl. Rep. 835

the plea was bad, because it ought to be brought within four years; if the latter, it was good. *Curia*, without hearing any argument, this was an action on the case. If it were trespass and assault, the wife must have joined judgment for the defendant." Secondly, he contended, that supposing the statute of limitations was pleadable to such an action, the plea ought not to be, "Not guilty of the premises, &c. within six years;" but that the cause of action did not accrue within six years, the gist of the action being the consequential damage, namely, the deprivation of comfort, &c.; as, if *assumpsit* be brought upon a promise to do an act at a future day, which was not then done, the plea cannot be *non assumpsit infra sex annos*, but *actio non accrevit infra sex annos*. *Gould v. Johnson.* (a)

[ \*115 ] \*Scarlett, *contra*, was stopped by the court.

Lord Ellenborough, Ch. J. The cause of action in these cases, arises from the time of the injury done by the defendant by the corruption of the body and mind of the wife: for from that time she is less qualified to perform the duties of the marriage state. Then the question is, whether this be an action on the case, or an action of trespass and assault? And it is said, that, the latter description only applies to personal assaults on the body of the plaintiff who sues: but nothing of that sort is said in the statute. No doubt that an action of trespass and assault may be maintained by a master for the battery of his servant, *per quod servitium amisit*; and so by a husband for a trespass and assault of this kind upon his wife, *per quod consortium amisit*. Then it is said, that the case of *Cooke v. Sayer* was decided on the supposition that it was an action on the case. It might be material to consider that point, if the question now were, whether the limitation of six, or of four years only, applied to this case: but if the defendant take the longer period, and plead not guilty within six years, that, of course, must include that he is not guilty within four years, and the plea not having been specially

(a) Salk. 422.

demurred to, is therefore good in either way of considering it. I do not know what my opinion would have been if the point had now first arisen, whether to have considered this as an action on the case or trespass: but it having been considered in *Cooke v. Sayer* as an action on the case, I should be inclined so to consider it. But, whichever it be taken to be, the bar equally applies to it.

\*Lawrence, J. At any rate, it would be going too [\*116] far to say, that there is no limitation whatever to such an action as the present; and if there be a limitation of it, it must either be of four or of six years: and then the objection to the plea is resolved into a mere matter of form, which cannot be taken advantage of on general demurrer. But upon the question, whether an action of this kind be trespass or case, besides the case of *Cooke v. Sayer*, and where, it is to be observed, that the plea was in the same form as the present, there was another case of *Parker v. Ironfield*, in this court, in Hil. term, 19 Geo. III. in which the declaration charged, that the defendant, on the 1st day of November, 1777, and on divers days and times between that day and the exhibiting of the plaintiff's bill, made an assault upon Mary Parker, the daughter and servant of the plaintiff, and debauched the said Mary, and carnally knew her, whereby he was deprived of her service. And Mr. Justice Buller has written on the back of his paper book, "This is an action on the case, and not of trespass, and therefore 'divers days,' &c. proper." And then there is this further endorsement on the paper book, "Declaration for debauching daughter, that defendant on divers times, &c. assaulted, &c. good; for this is an action on the case: *aliter*, in trespass for assault." He therefore certainly considered it as an action on the case, and not an action of trespass and assault. But leave was then given to withdraw the demurrer, on payment of costs.

Le Blanc, J. I had doubted whether the case just mentioned



was decided on the ground of the nature of the action, having myself a very short note of it. But \*I considered that this was either an action on the case, or an action of trespass, within the statute of limitations; for it would be very singular if this were to be considered as trespass of such a kind as to be taken out of so beneficial a statute. And in either way of considering it, the plea is a good bar.

Judgment was given for the defendant.

*Of the Commencing and Suing of Actions.*

THE statute requires that the several actions therein mentioned shall be commenced and sued within the time limited; [1]

[1] Motions, are included in the terms suits and actions in the act of 1789, for limitation of suits upon penal statutes. *The Auditor of Public Accounts vs. Graham*, 1 *Call's Rep.* 475.

The Judge's order for a writ of *Supersedeas*, is the true commencement of the proceedings here; [*Court of Appeals of Virginia* :] and therefore, if that be within five years from the date of the judgment, although the writ is not taken out till the five years have elapsed, it will be in time. *Overstreet vs. Marshal & Al.* 3 *Call's Rep.* 192.

In an action on the case on a note, to which the defendant pleaded the general issue, set-off and the Statute of Limitations, the jury found, the execution of the note and the amount due thereon; they also found, that by an injunction issued 7th July, 1787, by order of a Judge in the court of equity, and an order of the said court, that the note aforesaid was lodged in the hands of the clerk and master in equity, and that it appeared to the jury, that thereby the plaintiff was hindered from bringing suit on said note, that he afterwards brought suit on the 14th February, 1791. The question arising on this special verdict, was, whether the plaintiff's demand was barred by the Act of Limitations. And the Court said; "Whatever hardship there may be in this case, there is no legal ground or principle to warrant the Court to render judgment for the plaintiff. The Act of Limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso, we cannot add to these, others which the legislature has omitted; nor construe cases to be within the saving, which is plain were not meant to be included." *Vance vs. The Exors. of Grainger*, *Cam. & Norw. Rep.* 71. *See vide, Montgomery vs. Hernandez & Co.* 12 *Wheat. Rep.* 129; and *Hernandez & Al. vs. Montgomery*, 2 *Mart. Rep. (N. S.)* 422, *Contra*.

In the case of *The administrators of Colkings vs. The Surviving Partner of Thackston & Co.* (*Cam. & Norw. Rep.* 93, 95,) The Court said; "The plaintiffs and the defendants having

but the legislature(a) purposely avoided mentioning the teste

(a) Burr. 959.

"agreed to refer the matters in dispute between them to arbitrators, takes the case out of the Statute of Limitations, and the present suit having been brought within three years after the reference had been entered into and made a rule of court, the present plaintiffs are entitled to recover in this suit."

The taking out of a writ, is the commencement of an action, to save the demand from the Statute of Limitations, and not the service of the writ. *Allen vs. Mann*, 1 *Chap. Rep.* 94.

A claim against the estate of a deceased partner, accruing in consequence of the insolvency of the surviving partner, after the Statute of Limitations had run upon the claims against such estate generally, is not barred, though not exhibited within the period limited by the statute. *Pendleton & Al. vs. Phelps & Al.* (In *Equity*.) 4 *Day's Rep.* 476.

In the case of *Tyson vs. Simpson & Al.* (2 *Hayw. Rep.* 147.) TAYLOR, J. delivering the Opinion of the Court, said, "The Act of Limitations did not run so as to bar the action of the administrator; the letters were obtained not till lately; and the act begins to run only from the time of obtaining them."

In the case of *The Administrators of Quince vs. The Administrators of Ross*, (2 *Hayw. Rep.* 180.) JOHNSTON, J. delivered the Opinion of the Court as follows. "This bond was given in 1764, payable in December, 1764; in 1777 the obligor died; letters of administration issued in 1773, in the month of January; in 1794 the administrator died, and in 1798 new letters were issued to the present defendant. The rule is that after 20 years acquiescence presumption of payment shall arise, but if any circumstances can be offered to account for the delay, these shall hinder the presumption. Now here from 1773 to the first of June, 1784, the courts were shut up and the war intervened: after 1784 till 1794, when there was an administrator, is but 10 years, and from December, 1764, to 10th March, 1773, is but six years, added together 16. After 1794 till the commencement of this action suit could not be brought because there was no person to be sued; which sufficiently accounts for the delay. So that there is not 20 years of computable time from the period when this bond was payable to the commencement of this action, and the presumption will not arise." Verdict for the plaintiff.

of writs, the exhibiting bills, the arresting, the holding to bail, summoning, serving, or any other form of process; but leaves to every court to say, "what act of the party commences the suit;" and after the limited time, forbids that being done.

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Prescription does not run against him who cannot sue. *Hernandez & Al. vs. Montgomery*, 2 *Mart. Rep. (N. S.)* 422. & *Vido same case*, in *Error*, 12 *Wheat. Rep.* 129.

A writ of error must be sued within twenty years from the time when the title to it accrued, or within five years after the same disability which existed at that time has ceased. *Eager & Uz. vs. The Commonwealth & Munroe*, 4 *Mass. Rep.* 182.

A promise made on the 1st of November, 1811, was sued on the first of November, 1817; and it was holden to be barred by the Statute of Limitations. *Presbrey & Al. vs. Williams*, 15 *Mass. Rep.* 193.

A mutual understanding and agreement between a debtor and creditor, that suit shall not be brought upon an account until the debtor shall have gone to *Europe* and returned, is a good bar to the Act of Limitations during his absence from this country, and may be given in evidence to prevent the Court's expunging from such account items appearing to have been due five years before his death. *Holladay, Ex'or. &c. vs. Littlepage*, 2 *Munf. Rep.* 316.

Under the practice in *New-Hampshire*, the true time, when a writ is sued out or an action commenced, is the time when the writ is, in fact, filled up with the declaration in order to have it served on the opposite party. *Society for propagating the Gospel vs. Whitcomb*, 1 *New-Hamp. Rep. (R. & W.)* 227.

The executor of A. was sued on a note of hand; plea Statute of Limitations; Replication that by the act of 1789, (of *So. Carolina*;) nine months are allowed to executors and administrators after the death of their testator or intestate, before they can be sued, and that the plaintiff ought not to be barred, having been restrained by the aforesaid act nine months, from commencing his action. *Held*, that the plaintiff was allowed four years exclusive of the nine months. *Moses vs. Jones' Ex'or. &c.* 2 *Nott & McC. Rep.* 259.

The Court will not, in a penal action alter the term of which a declaration is entitled, to a previous term, in order to bring it within the time limited for the action. *Woodroffe vs. Williams*, 1 *Marsh. (Eng. Com. Pleas.) Rep.* 419.

In the king's bench, by the general rule<sup>(a)</sup> and course of the court, the filing of the bill is the commencing of a suit, and the bill of Middlesex, or *latitat*, but process to bring the party in; except where replied to avoid the statute of limitations, or a tender when these processes are considered as the commencing of a suit.

To a plea<sup>(b)</sup> of the statute, the plaintiff replied a *latitat* purchased a long time before, with the intention to declare in that action: and the court held that he had, by that *latitat*, saved himself from being barred, for it was a commencing of an action in the king's bench.

[\*119] \*But if the *latitat* be for a smaller sum than the damages laid, the court will not intend it to be for the same cause, unless so stated.

In an action<sup>(c)</sup> on the case, &c. the plaintiff declared and laid his damages to four hundred pounds. The defendant pleaded the statute of limitations, "*non assumpsit infra sex annos.*" The plaintiff replied, that he sued out a *latitat* to take the defendant two years before the action brought for 150*l.* And upon a demurrer to this replication, it was insisted, on the part of the defendant, that these were different actions; for no man would take out a *latitat* for 150*l.* and declare *ad damnum* 400*l.* It is true, if the plaintiff had averred it had been one and the same cause of action, it might have been otherwise; and so it was ruled by the court.

But as a *latitat*, when sued out in vacation, is tested of the preceding term, and therefore the action may appear to have been commenced within time, when, in fact, it was barred by

(a) Cowp. 454.

(b) Sid 52. Carth. 232.

(c) 8 Mod. 109.

the statute, the defendant may rebut this, by showing the very day on which the writ was taken out. [1].

By Lord Mansfield.(a) There never was a plainer proposition, conceived in plainer English words, than the rule laid

(a) Barr. 950.

[1] The Statute of Limitations as to reviews, stops at the time the writ [of review] is sued out. The date and not the service of the writ is *prima facie* evidence of the true time when it was sued out. But this *prima facie* evidence may be rebutted, and the true time shewn by parol testimony. *Society for propagating the Gospel vs. Whitcomb*, 1 *New-Hamp. Rep. (R. & W.)* 227.

The condition of a Marshal's Bond is broken by his neglecting to bring money into court, directed to be so brought in, or to pay it over to the party; yet if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued, so as to bar it, if not commenced within six years. *Montgomery vs. Hernandez & Al. (In Error.)* 12 *Wheat. Rep.* 129.

In the case of *Guild & Al. vs. Hale, Executor, &c.* (15 *Mass. Rep.* 455. 458.) The Court said; "The plaintiffs are not barred by the Statute of Limitations. The six years had not expired at the death of the testator: The plaintiffs therefore had two years after the grant of administration, within which to commence an action against the defendant." [Stat. 1793, c. 75.] Before it was necessary for them to commence an action, and before they could regularly do it according to Stat. 1788, c. 66, that is, within one year after the defendant undertook his trust, he had represented the estate to be insolvent. This again prevented the plaintiff from commencing an action at law, and they were compelled to present their claim to the commissioners [of Insolvency] for allowance. They did so present it within the time prescribed by law, and by the order of the Judge of Probate. It is therefore clear, that their claim was not barred by the Statute of Limitations, when it was first laid before the commissioners.—The proceedings in the present action are in the nature of an appeal from the adjudication of the commissioners. The question to be tried is, whether they ought, or ought not, to have allowed the plaintiff's claim; and it is to be tried here on the same principles, on which it was, or ought to have been tried before the commissioners. The presenting of the claim to them was virtually the commencement of this action."

down by this act of parliament. It enacts, "that all actions upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants) shall be commenced and sued within six years next after the cause of such actions or suit, and not after."

[\*120] \*The statute is negative, and prohibits that which must be the act of the party; be the form as it may, the suing, commencing, or bringing an action, must be by some act of the party; and that is the thing prohibited, after the expiration of the limited time.

The preceding act of limitation, 32 H. VIII. c. 2. computes the prescription from the time run before the teste of the writs therein mentioned: but because that would not be a true criterion of the time of commencing suits within the provisions of this statute of 21 Jac. I. c. 16. the legislature has, in the latter, (which professes to be made for quieting of men's estates and avoiding of suits,) purposely avoided mentioning the teste of writs, the exhibiting bills, the arresting, the holding to bail, summoning, serving, or any other form of process; but leaves to every court to say, "what act of the party commences the suit;" and after the limited time, forbids that being done. The moment the six years expire, the prohibition attaches: the legislature says, "he shall not sue after that time." If the time expired in June, and he takes out his process in October, the act done by him in October is prohibited, and against the law; for the statute says, he shall not sue after. If, by antedating the writ, he does sue after, then this effect of antedate is directly contrary to both the words and meaning of the act of parliament.

If so plain a thing can be made plainer, there happens to be a clause in the act which is decisive: (a) "Sufficient amends may be tendered for an involuntary trespass before the

(a) See. 5.

action brought." Apply the argument to this clause, and the provision will be thus : "To prevent \*frivolous and vexatious suits, there may be a tender of sufficient amends before the action brought : but by an implied reference to the course of the court of king's bench, the party may, after the tender, bring his action with an antedate, which shall overreach and defeat the tender." And so the implied reference repeals the express text.

The statute did not intend to bar, unless the party had acquiesced six years. But he who sued out a *latitat*, to bring the defendant into custody, that he might declare against him, did not acquiesce within the true meaning of the act ; though artificially, the bill is, upon the record, the first step: The day he sued out the *latitat* he might have taken out an original: and any construction of the statute to make it bar one form of suing, while others were open, was nugatory, and contrary to its true intent. But to bring it within the equity of the law, the *latitat* must be taken out with an intent to declare in that action, and must be continued to filing of the bill.

When the replication of a *latitat* came to be allowed to save the bar, and prevent the running of the statute, because suing out a *latitat* was, in real truth, an act of diligence of the party, and the first step towards recovering his demand by the action depending, (though in a strict legal sense, by the course of this court, such action is not deemed to be brought till the bill is filed,) it would be most extraordinary and most unequitable, not to allow this equity to be rebutted by the defendant, by showing, "that, in real truth, the time was run before the plaintiff took any step." He was actually barred before he sued out the *latitat* ; though, in form, by the course of this court, \*as the action is supposed to be brought later, the *lat-* [ \*122 ] *itat* is supposed to be taken out earlier, than the real truth.

Therefore we are all clearly of opinion, that within the true



meaning of the act of parliament, six years having expired before the *latitat* was in fact taken out, is sufficient to rebut the matter of the plaintiff's replication; which alleges, that although the suit was not brought within the six years, according to the course and legal notions of this court, yet, in fact, it was brought within the time by suing out the *latitat*.

Second point—Whether the party may be permitted to show that the *latitat* was taken out after the six years expired?

If the teste of a *latitat* was conclusive, wrong must necessarily be done, in many other cases as well as the present, and great inconvenience and absurdity would follow. No man, whose cause of action arose in the vacation, could sue out this process till the next term; which would be an injury to plaintiffs, and defeat the very end for which this practice was introduced. The defendant might be arrested long before the writ: he might be sued after he had made a legal tender, which would be a manifest injury to defendants. But the court would not endure, that a mere form, or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing: and they have, for one hundred and fifty years, uniformly held, "that where it became material to distinguish, they would consider the day when the writ was taken out as the substance, and the teste as the form."

[\*123] \*In the case of *Pigot v. Rogers*,<sup>(a)</sup> it was held, that a *latitat* bearing date before the bond upon which the action was brought, but returnable after, was right; because, says the court, "the process always bears teste the last day of the term before."

So in 3 Keb. 213. an obligation "not to prosecute before a limited time," was holden not to be broken by a *latitat* taken out after the time, though it was tested before: the reason given is, because the *latitat* is not suable with any other teste than of the preceding term.

(a) Cro. Jac. 561.

Where the arrest is before the actual suing out of the writ, it has been often determined that it cannot be justified; and that the day when it issued may be averred notwithstanding the teste is before the arrest.

The case of *Bilton v. Johnson and others*,<sup>(a)</sup> was trespass and false imprisonment in London. The defendant pleads that J. S. sued forth a writ of *latitat*, the first day of Trinity term, directed to the sheriff of R.; and by virtue of that, the sheriff of the said county made a warrant to the defendant, whereupon he took the plaintiff; (which is the same imprisonment;) *absque hoc* that he is guilty in London, *vel aliter, vel alio modo*. The plaintiff replies, that the said writ was, in truth, prosecuted after the imprisonment, (to wit,) on the 9th of August. Upon this the defendant demurs. And it was adjudged for the plaintiff; because, although the teste of the writ is upon record, and the plaintiff cannot aver against it, yet here will be great inconveniences, if the plaintiff cannot set forth the very time when it was purchased: and the \*relation of the date [ \*124 ] to the last day of the preceding term is only calculated to prevent fraud, but not to justify a tort.

And in the same case, Lord Ch. J. Kelynge is<sup>(b)</sup> reported to have said, that the time when a *latitat* is sued forth is traversable, and may be averred otherwise than according to the teste: which was agreed by the whole court; for a relation shall not work a wrong. If a man be taken in the vacation by warrant without writ, and a *latitat* be procured, tested in the preceding term, it shall not discharge the wrong done after the teste, and before the actual taking out of the writ; but the plaintiff may take issue when it was prosecuted in truth.

In the case of *Hanway v. Merrey*,<sup>(c)</sup> it was holden, that though a *latitat* may be taken out before the cause of action, yet the

(a) Raym. 161.

(b) 2 Keb. 198.

(c) 1 Vent. 22.

party cannot be arrested upon it till after ; and in that case the court discharged the arrest.

In the case of *Chauney v. Rutter*,<sup>(a)</sup> in trespass and false imprisonment, the defendant justified by arrest on a *latitat*. The plaintiff replied, that the writ was taken out after the arrest ; to which replication the defendant demurred. *Et per Curiam*—The antedate of the writ will not suffice, if the proceeding be after.

So as to tenders. In the case of *Watts v. Baker*,<sup>(b)</sup> it was holden, “that a tender came too late after an arrest upon a *latitat*.” But the ground of that case implies, that if a tender was made before the *latitat* taken out in fact, the retrospective teste of the writ (which might be even before the cause of action) could not deprive the defendant of the benefit of that tender.

[ \*125 ] \*In an action upon the case, where it is necessary to state the taking out a *latitat*, the party may declare that it was sued out such a day in the vacation, bearing teste the last day of the preceding term ; or if the teste only be stated in the declaration, and the question should turn upon the precise day when it was taken out, the jury may find it. And this was adjudged<sup>(c)</sup> so long ago as the reign of Charles II.

The declaration alleged the *latitat* to be sued out of the court on the 21st of January : the jury found that the teste of it was on the 28th of November, being the last day of the preceding term ; but that it was indeed sued out of the court on the 21st of January, as the plaintiff had declared. The declaration was held to be good, because it was according to the truth of the fact, though the teste of a *latitat* must be of the preceding term.

In the same case, reported in 1 Ventr. 362. it is stated, that a special verdict was found, “that the *latitat* bore teste the 28th

(a) 3 Keb. 213.

(b) Cro. Car. 204.

(c) Sir T. Jones, 149.

of November, 32 Car. II. but was really taken out the 21st of January following." Holt, who was counsel for the defendant, argued, that by law it must be deemed to be taken out the 28th of November, when the teste is. Lord Ch. J. Pemberton is reported to have given the rule in the following words: "We know the course of this court is to teste *latitats* taken out in the vacation as of the term preceding: and the course of a court is the law of a court. The plaintiff might have declared, that he sued out a *latitat* the 21st of January, tested the 28th of November preceding; and if he be not estopped to declare so, surely the jury may find the whole matter." And so judgment was given for the plaintiff.

\*Numberless are the acts of parliament in the statute book which give actions "so as the suit be brought or commenced within one, two, three, or four months, or some longer time, and not afterwards." And many give actions to the party aggrieved, to be brought within two, three, or four months, and if the party aggrieved do not sue within that time, then to a common informer.

Notwithstanding the doubt in the case of *Culliford v. Blandford*,<sup>(a)</sup> it is now settled, "that a *latitat* is a good commencement of a penal action:" and was so holden in this court, in Hil. 22 G. II. in the case of *Brydges, qui tam, v. Knapton*.

If the teste of a *latitat* was to be conclusive as to the time of suing, the time given by the legislature might be enlarged to double or triple the number of months. After expiration of the time given to the party aggrieved, the common informer might take out a writ: and then the party aggrieved might defeat his right after it had attached, by taking out a *latitat* with an antedate. By this mere form or fiction of law, (which, for good purposes, gives the *latitat* an antedate merely as a matter of form,) penal statutes would be rendered more penal; and men

(a) 4 Mod. 129.

would be subject to penalties, to which, by law, according to the truth of the case, they are not liable. The plaintiff who sues upon any of these acts (which are very numerous) must take out the writ in fact within the time: the teste of the writ will not be sufficient. The act done by him, in commencing the suit within the limited time, is in the nature of a condition precedent to entitle him to maintain that action. If the legislature had not taken for granted, "that the true time of [\*127] -suing \*out a writ might be shown in opposition to the teste," it would have been absurd to have limited the time to one, two, or three months, followed by the negative words, "and not afterwards:" or, in default of the party aggrieved suing within such time, to give an immediate right to a common informer: and yet this is the form in which such actions are penned, from the beginning to the end of the statute book.

The act of 23 H. VI. c. 15. gives a penalty of 40*l.* to the burgess chosen, and not returned, so as he sue for the same within three months; or to any other person who, in default of him so chosen, shall sue for the same. Suppose *latitats* were taken out upon this act by the party aggrieved, and also by many other persons, in the long vacation, all bearing date the last day of Trinity term, how could it be determined "who had a right to sue," but by showing the true times when the writs were respectively prosecuted?

The 9 Anne, c. 14. gives an action to the person losing 10*l.* at play, to be brought within three months; and if he do not sue within that time, then to any body else. There are a multitude of modern acts, down to the present session of parliament, penned exactly in the same way. I have been told, that at *Nisi Prius* it has been often ruled, in suits upon such statutes, "that the true time of taking out the writ may be shown, notwithstanding the teste." The very penning of 8 G. I. c. 19. is absolutely inconsistent with the notion of the teste being conclusive; because it says, the suit "shall be brought before the end of the

next term;" which this doctrine would construe to mean, after the end of the next term.

\*But there is one act in the statute book which [\*128] alone would be decisive that the true time of suing out the writ may be shown, and that is 5 W. & M. c. 21. s. 4. where (for preventing abuses by arresting persons without legal process) the officer is required to enter the very day when the writ is signed. But if the very day could never be shown in pleading or evidence, it would have been most absurd to have provided a record from which it might appear. The statute does not enact that the teste shall not be conclusive, but takes it for granted that it is not.

It was due to the great and long litigation which this question has borne in Westminster-Hall, to consider carefully every thing that has been said, and to look into every case and authority that has been quoted on the other side. I have done so: and, upon the most minute examination, am not able to find any principle of law, determination, or authority, which contradicts the proposition I have endeavoured to prove, viz. that where the true time of suing out a *latitat* is material, it may be shown notwithstanding the teste.

The arguments against allowing such an averment, are drawn from rules and cases, the reason of which is not the same, though they bear a seeming similitude in sound. No conclusion can be drawn from rules established in the case of a writ which ought to bear date the day it is sued out, and which may be quashed, upon motion, for irregularity, if it be antedated. I allow the maxim laid down in Plowden,<sup>(a)</sup> and many other books, "that no man shall be allowed to plead or prove that such a writ was sued out on a different day from that on which it bears date." Plowden gives the reason:—Because contradicting the *\*teste* tends to discredit some judicial or [\*129]

(a) Plowd. 491. b. 492. a.

other officer of record. But this only goes to the mode of redress: the false date does not finally conclude the party. His redress is in a summary way, by application to the court out of which the writ issues: and therefore, in the court of exchequer, in the case of *The King v. Mann*,<sup>(a)</sup> upon an extent, the court inclined to disallow the plea, and set aside the writ, upon motion, because it was antedated.

. But an averment, "that a *latitat* tested the last day of the precedent term, issued in the vacation, does not tend to discredit the officer;" for, by law, it may so issue, and ought to be so antedated. It cannot be set aside, upon motion, for irregularity; because it is right. The averment does not contradict the record, because, taking the course of this court, together with the teste of the writ, it stands indifferent whether the writ was sued out the last day of the term, or in the vacation. And there is the difference between such a writ as this, and those that are intended by Plowden.

The reason why nobody shall be permitted to aver that a judgment was signed after the first day of term, or that a *feri facias* was taken out in the vacation, is, because the fact is not relevant: the legal consequences do not depend upon the truth of the fact, on what day the judgment was completed, or the writ of *feri facias* actually taken out, but upon the rule of the law, "that they shall be deemed complete and binding, to all intents and purposes, by relation."

The moment the law said; "Judgment shall bind purchasers only from the signing," it followed, that in the case of purchasers the time of signing might be shown.

[\*130] \*If, to invalidate the writ, there was an averment that it issued on a day in the vacation; there the inference would hold, from the case of a judgment, or *feri facias*;

and, to be sure, such an averment could not be allowed, because to that purpose the fact is not relevant; for, by law, a *latitat* may issue in the vacation, tested the last day of the precedent term. Authorities, that a *latitat* is void if it bears teste out of term (which is the case of *Buckbridge v. Wright*), (a) prove nothing to the present purpose, because it is equally certain that it may be purchased out of term, provided the teste be formal. The case of *Jones, an Attorney, v. Burnet*, (b) upon a writ of privilege, is not applicable. The court there held the replication to be insufficient, but abated the writ; and the ground they went upon was, that it appeared, on the plaintiff's own showing, that his writ bore date before his cause of action, though, in fact, taken out after. But they considered that writ in the nature of an original, and therefore abateable, if it bear date before the cause of action. Now, the direct contrary is the established law in the case of a *latitat*; for it may bear date before, if really prosecuted after, the cause of action.

The case of *Aldworth v. Hutchinson* (c) has been much relied upon, though it was never argued again. Judgment *non* is said to have been given for the plaintiff, and no cause shown: but no judgment is entered on the roll. And there might be a very good reason to give judgment for the plaintiff, upon the true construction of the covenant. The words might very fairly take in all process as of that term; especially a judicial writ, which must proceed upon a ground prior to the end of the term. The \*reporter supposing the time of suing [ \*131 ] out the *scire facias* to be material, passes a strong censure upon the judgment, if it stopped the party from showing the truth: for he says, "If such be the ground then, in judgment of law, a covenant may be broken when in reality and truth, it never was broken: *quod nota*." And it would be well worth noting, indeed, for no proposition could be more unjust.

Upon the argument in this cause it was said, that Lord Hard-

(a) Hil. 12 G. I. B. R. (b) P. 5 G. II. C. B. (c) 1 Lutw. 320.



wicke, in the case of *Hoare v. Yates*,<sup>(a)</sup> was of opinion against the averment; and that Mr. J. Lee came over to that opinion; and that his lordship was ready to have given judgment, when he was told the parties had agreed.

I cannot form an opinion upon a point of law which would not be shaken by so great an authority: but his lordship has been so good as to let me have his notes of the two arguments in that case before him. There is no notice taken, in his lordship's own notes, of what might fall from himself: and it does not appear, from his lordship's notes of what Mr. Justice Lee said, that he changed his opinion. His lordship says, he believes he had not formed a conclusive judgment in his own mind; and that he certainly had made no preparation towards delivering it in court. And he has been pleased to tell me, that he inclined to the opinions of Mr. Justice Page and Mr. Justice Lee (who were for admitting the averment in the defendant's rejoinder) against the opinion of Mr. Justice Probyn, who thought it could not be admitted by law. And we are all, most clearly [\*132] of opinion, that the \*averment in the defendant's rejoinder ought by law to be admitted; consequently, the demurrer must be over-ruled, and judgment given for the defendant.

And in the common pleas,<sup>(b)</sup> in an action of *assumpsit* for goods sold, to the statute pleaded, the plaintiff replied, that before the six years were out he brought an original in trespass against the defendant, with the intent to declare against him in *assumpsit*, according to the custom of the court. The defendant said, that there was no such record; and the plaintiff produced an original in trespass, brought within the time, against the defendant and two others; and it was in trespass and assault in London: and it was moved, that this record did not make good the replication, for it was against three, and it should have been in a *clausum fregit*; for that was said to be the course of

(a) P. 5 G. II. B. R.

(b) 2 Vent. 194.

the court to declare in any thing upon such a writ. No judgment was given in this case: but as to the suing of an original in trespass and assault, contrary to the custom of the court, the prothonotary informed the court, that the original being in London, the cursitor would not make a *clausum fregit* into London; and therefore, though in other counties that was to be, yet trespass and assault would do in this case; and such was the constant practice; and that it was not material though others were joined in the writ with the defendant; but the court doubted of the practice.

And in the subsequent case of *Every v. Carter*,<sup>(a)</sup> wherein the plaintiff declared on several promises, to which the statute of limitations was pleaded, the plaintiff replied an original, prosecuted against the defendant \*before six [\*133] years were elapsed. The defendant cravedoyer of the writ, which was in trespass *quare clausum fregit*; and denied that the writ made good the writ mentioned in the replication. To this the plaintiff demurred; and the court agreed that it was the practice then settled in the court, to take out such an original in a *clausum fregit*, and to declare in *assumpsit*, or the like.

But<sup>(b)</sup> where the *assumpsit* was laid in one county, and the replication to the plea of the statute of limitations showed a writ of *clausum fregit* brought within six years in another, the judgment of the common pleas, that this writ had avoided the statute of limitations, was reversed on error; and Holt, Ch. J. said, though such a writ of *clausum fregit* might be a sufficient process to bring in the party, and compel an appearance, yet it could not be an original to avoid the statute of limitations: that way of proceeding was to eradicate all the principles of law.

So, where a *clausum fregit*<sup>(c)</sup> in Dorsetshire was replied, to

(a) 2 Vent. 259.

(b) Ld. Raym. 553.

(c) 12 Mod. 570.

avoid the statute of limitations, in an action of *assumpsit* in London, in which the court of common pleas gave judgment on demurrer for the plaintiff, which was afterwards reversed in error in the king's bench, because the continuances of the writ did not appear.

Holt, Ch. J. in giving judgment, said, You say that it is the course of the court, time out of mind. The question is, whether that must be granted; or, if it be contradicted, how it shall be tried? It cannot be by jury; therefore alleging or [ \*134 ] not alleging is not material; for \*if it be the course of the court, it is matter of law, of which we, as judges, must take notice. Such a way has obtained, but the question is, whether such a course has efficacy enough to be a good ground for a declaration; and suppose, when the defendant comes in, and puts in bail, he demands oyer of the original, do you think it will be enough to give him oyer of the *clausum fregit*? And he asked here, could an original in Dorsetshire be a foundation for a declaration in London?

Error(a) was brought upon a judgment in the common pleas in *indebitatus assumpsit*, and the action laid in Leicestershire. The defendant pleaded the statute of limitations, and the plaintiff replied a *clausum fregit* in Derbyshire, sued within six years, to arrest the defendant; and when he was brought in to declare against him in *assumpsit*, according to the course of the common pleas, the defendant rejoined, that he did not assume within six years before the issuing of the *clausum fregit*; and upon issue thereon, a verdict was given for the plaintiff, and judgment accordingly, in the common pleas.

And upon the general errors assigned, Mr. Parker, for the defendant in error, argued, that supposing the *clausum fregit* was sued with intent to declare in another action, and was well continued until the time of the declaration in the said action,

that will be a sufficient prosecution within the statute of limitations : and that though in this case the *clausum fregit* was not continued, yet that will be aided by the verdict ; which will distinguish this case from that of *Mois v. Brereton*,<sup>(a)</sup> and of *Kinsay v. Hayward*,<sup>(b)</sup> which cases were adjudged upon the point of the discontinuance. That such a [\*135] writ sued will avoid the operation of the statute of limitations ; because the words of the statute are general, " shall be commenced and sued." If it had been said, that an original shall be sued, the objection here would have been strong ; but now the sole question is, what shall be said the commencement and suit of an action ? Whatsoever is a proper method to bring the defendant into court to answer will be the commencement and suit of an action ; because an action, in Co. Litt. 185. is defined to be nothing but *jus prosequendi in judicio quod sibi debetur*. That a *clausum fregit* is proper for that purpose, appears, first, because, if a man lives in one county, and commits a trespass in another ; if he be sued by original in trespass, there ought to be an original, and a *capias* upon it, in the proper county ; and then a *testatum capias* in the county where he lives ; all which dilatory proceeding is saved by the suing of a *clausum fregit* at once ; and by declaring against him in the proper county when he comes in. Secondly, if a man makes a contract in the vacation, intending to run away immediately, if he be sued by original, he must be let go at large, because one cannot have an original but of the precedent term, which will be before the cause of action. But now, by the help of this *clausum fregit*, one may arrest him presently, and declare against him in a proper action the next term. The statute of 13 Car. II. st. 2. c. 2. in the preamble, takes notice of these *clausum fregits*, that they were processes used in the commencement of actions. And the said course is confirmed in T. Jones, 217. *Atkins v. Jay*. Besides, that there are other commencements of suits in the common pleas, than by original, as by bills of privilege. The true commencement of every action, in point of law, is a proper original in [\*136]

(a) Ld. Raym. 568.

(b) 12 Mod. 570.

such action; and therefore, strictly speaking, a *clausum fregit* cannot be an original, but in an action of trespass: but yet, if, by the course of the common pleas, a *clausum fregit* issues before the suing of a proper original in any action, and is used as process to bring the defendant in, and upon such *clausum fregit* he is arrested, &c. the suing of such *clausum fregit* will be a suing, and commencement of an action within the meaning of the statute of limitations; for it is equally a demand of my right. And what shall be, and what shall not be, a commencement of an action, must be determined by the course of the court. And that is the reason why a bill in the king's bench is held as the original there, and the want of it aided by verdict by 18 Eliz. c. 14. within the words, "want of any writ, original," &c. Hob. 204. This statute has been expounded liberally, as to the saving the writ of the parties: therefore, it has been resolved, that where an action has been commenced by plaint entered in an inferior court within these six years; and then the action has been removed by *habeas corpus*, and the statute pleaded; though the proceedings were here *de novo*, yet the entry of the plaint in the inferior court was such a proceeding as would avoid the statute of limitations; and that the proceedings upon the *habeas corpus* were in some sort a continuance of the former suit. 1 Sid. 228. *Whitwith v. Hovenden*, and the case in 3 Lev. 245. is exactly a case in point. Then, he said, that the case of *latitats* in this court were of the same nature; for they are issued for a supposed trespass, and when the defendant comes in, he shall answer in other actions. But the case of the *latitat* is the stronger case; for a *latitat* may bear teste before the cause of action, 1 Vent. 28.: and the [\*137] bill of Middlesex in this \*court is never filed, and the *latitat* is the first process. Dyer, 118. Cro. Car. 264. So the *clausum fregit* is the first process in the common pleas, and always filed.

Objection: that there is no foundation for this averment, since there is no clause of *Ac etiam billa* in it, as there is in *latitats*.

Answer. The same objection held in all cases of *latitats* before the 13 Car. II. st. 2 c. 2. in compliance with which statute the said clause was inserted in *latitats*, as appears in 1 Keb. 598. and so it is at this day in all *latitats*, where special bail is not required. As to the matter of the discontinuance, he said, that it was aided by the verdict by the 32 H. VIII. c. 30. And he cited several cases of defects aided by verdict, as Yelv. 129. *Kendrick v. Pargiter*; 1 Saund. 226. *Stennel v. Hogden*; 1 Lev. 196. Cro. Car. 240. the case of *Gidley v. Williams*; Raym. 634. Allen, 32. Cro. Jac. 434. 2 Keb. 188. 230. the case in point upon a plea of a *latitat*.

*E contra*, it was argued by Mr. Cheshyre, for the plaintiff in error, that both cases cited by Mr. Parker, of *Mois v. Breton*,<sup>(a)</sup> and *Kinsey v. Hayward*,<sup>(b)</sup> were adjudged upon this reason, viz. the originals were not proper in the said actions; and that this was worse than any of them, because this action was brought by executors, and the *clausum fregit* was for a trespass done to them in their own right, *quare clausum ipsorum fregit*; that the verdict would not help, because the original was improper, and therefore the issue void and immaterial; but in the cases cited of the other side the issues were proper.

\*Holt, Ch. J. said, that this case was not like the case [\*138] of *latitats* in the king's bench; because a *latitat* is an ancient process of this court, and was a process of this court at the time of making of the statute of limitations, and the use only to bring in a man in custody; and then they declare against him in *custodia marescalli marescalcie*. But when a man is brought in by a *clausum fregit* in the common pleas, they do not declare against him in *custodia guardiana de la Fleet*, but upon an original proper for the action. And this practice of *clausum fregit* in the common pleas is new, and they have another way to sue there, viz. by original. But in the king's bench, a *latitat*, in some actions, is the only way to commence the suit. North,

(a) *Ld. Raym.* 568.

(b) *12 Mod.* 670.

Chief Justice of the common pleas, made a complaint of *latitats* in parliament, and the matter suffered great agitation in parliament; but at last the *latitats* were approved; as they are also by 27 Eliz. c. 8. which gives a writ of error in the exchequer chamber, but excepts errors to be assigned for want of jurisdiction in the king's bench. Now, this being the process of the king's bench at the time of the making of the statute of limitations, it must be understood to be comprised within the meaning of the act. And he said, he imagined, that after the reversal of the judgment of *Kinsey v. Hayward*,<sup>(a)</sup> was affirmed in parliament, this point would never have been moved again. But farther, he said, here was a fatal fault, viz. that the plaintiff does not show that the original was ever returned. Now, if he shows a writ, and does not return it, that will not avoid the statute of limitations.

[\*139] \*And Powys and Gould, Js. agreed in all these matters with the Chief Justice Holt; and said, that in the case of *Culliford v. Blandford*,<sup>(b)</sup> in the exchequer chamber, all the judges there held, that a *latitat* was a kind of original in the king's bench.

Powell, J. agreed with them, that the judgment ought to be reversed, for want of showing a return of the writ. But as to the other point, he seemed to retain the opinion, that he had given in the common pleas, in the case of *Kinsey v. Hayward*, when he was judge there, viz. that the showing of such *clausum fregit* will avoid the statute of limitations, as well as a *latitat*; alleging that a *clausum fregit* was the ancient process of the common pleas, and very useful to the subject in saving the fines due upon the original; which they never sue, if there is a verdict in the cause; but after a demurrer they sue it. The judgment was reversed.

In *Lethbridge, Administrator of Richards, v. Chapman and*

(a) 12 Mod. 570.

(b) Garth. 282.

wife, (a) it was expressly adjudged, that within the reason of those cases before cited, where in it has been holden, that a *latitat* was sufficient to avoid the statute of limitations, a *capias* in the common pleas was sufficient, without suing out an original. And in *Karver v. Janes*, Willes, 258. it was agreed by all the judges, on special demurrer, that a *capias* was a sufficient commencement of a suit.

In an action on the case, (b) against persons acting under commissioners for paving by act of parliament, for raising the street in front of plaintiff's house, by which the [\*140] passage and lights were obstructed, it became a question whether the action had been commenced in time. In order to prove the action to be commenced within the time limited by the act, a *capias ad respondendum* (issued out of the court) was produced and read in evidence, and which appeared to have issued on the 15th day of December, 1772, and was returned the 20th day of January, 1773; and was sued out with intent to declare in the present action, upon the appearance of the defendants thereto, and upon such appearance, did declare against them: whereupon a verdict was found for the plaintiff, subject to the opinion of the court upon the two following questions:—

1st Q. Whether the above action would lie against the defendants under the circumstances of the case?—2d Q. Whether the *capias ad respondendum* ought to have been read in evidence to prove the time of the commencement of the suit?

Serjeant Walker, for the defendant, contended that the *capias ad respondendum* ought not to have been read in evidence, to prove the time of the commencement of the suit, because that writ is not the commencement of an action in this court: the plaintiff ought to have produced and shown in evidence to the jury the original writ, sued out within the time limited by this act of parliament; for she alleges, in her declaration, that the

(a) 15 Vin. Abr. 103.

(b) 3 Wils. 461.



defendants, on the 1st day of June, and on divers days and times between that day and the day of suing forth her original writ, did the damage and injury she complains of; so, where the statute of limitations is pleaded to an *assumpsit* in this court, and the plaintiff replies by showing that a *capias* [\*141] *\*ad respondendum* was sued out within six years next after the cause of action accrued, it will not take it out of the statute.

Gould, J. If the *capias ad respondendum* be sued out within six months, (as it appears to be,) the original must be presumed to be sued out within six months, for it immediately precedes the *capias*.

Blackstone, J. The *latitas* is the commencement of the action in the king's bench, and yet it supposes a bill of Middlesex to have issued before. I think the *capias ad respondendum* was very rightly admitted to be read in evidence to show the commencement of the suit.

Serjeant Walker said, as the court seemed to be of opinion, that the *capias* was properly admissible to be read to show the commencement of the suit, he should go on to the other question, and endeavour to show, that this action doth not lie against the defendant under the circumstances of the case.

Gould, J. I am very clearly of opinion that this action well lies against the defendant; that the action was commenced in due time, and that the *capias ad respondendum* was very properly read in evidence to prove the time of the commencement of the suit.

And by Lord Kenyon, at the Middlesex sittings, after Michaelmas, 1788, in *Gosling v. Witherspoon*, If, to a plea of tender, or the statute of limitations, the plaintiff reply an [\*142] original, sued out within the time, the production \*of a *capias ad respondendum*, sued out within six years, is

evidence of an original having been sued out, for the court will presume it.

The commencement of an action in an inferior court will prevent the statute of limitations from attaching upon the cause of action.

In *Bevin v. Chapman*, 1 Sid. 228. the court of king's bench held, that if an action be commenced in an inferior court, and then removed by *habeas corpus*, and they proceed anew, that commencement serves to prevent the statute of limitations, which was recognized in *Mois v. Brereton*, Raym. 553. The court also held, that if a plaint be levied in an inferior court within the six years, and then it is removed into the king's bench by *habeas corpus*, and the plaintiff declares there *de novo*, and the defendant pleads the statute of limitations; the plaintiff may reply, and show the plaint in the inferior court; and that will be sufficient to avoid the statute of limitations.

So, where debt was brought in the palace court,<sup>(a)</sup> and after some proceedings there, the six years expired; the defendant sued a *habeas corpus*, and removed the cause into the king's bench, where the plaintiff declared *de novo*, and the defendant pleaded, that the cause of action did not accrue within six years before the teste of the *habeas corpus*; and this was held to be a good plea; but that the plaintiff might reply the suit below, and show that to have been within the six years: not that this suit was a continuance of the suit below, but that the plaintiff had \*rightfully and legally pursued his right; and [\*143] it should not be in the power of the defendants to defeat or hinder him of a remedy, without any default; as, where one brings an action before the expiration of six years, and dies before judgment, the six years being expired, this shall not prevent his executor.

(a) Salk. 424.

Action upon the case(a) upon several promises; and the plaintiff declared, first, upon a promissory note of 12*l.* 11*s.*; second count, upon an *indebitatus assumpsit* for 20*l.* money lent; and, third, for money laid out. To the first count, upon the promissory note, the defendant pleaded, that the cause of action did not accrue *infra sex annos*; and to the other two counts he pleaded *non assumpsit* generally; upon which issue was joined.

And as to the defendant's plea to the first count, the plaintiff replied, and admitted that the cause of action did not arise within six years before his exhibiting his bill in this court, but that it arose the 25th March, 1720, and that, upon the 11th February, 1725, in order to recover the money due to him upon that promise, he levied his plaint in the sheriff of London's court, in *placito transgressionis super casum*; and avers that, *secundum consuetudinem civitatis præd'*, he there declared against the defendant in an action upon the case, and sets forth his declaration; which was, *eo quod* the defendant, such a day, *indebitat' fuit quer'*, in 20*l.* *pro divers. pecuniarum summis per præd' def. præfat' quer' prius debet*, which he promised to pay: then the plaintiff set forth, that the defendant hereupon brought his writ of *habeas corpus*, by virtue of which the said plaint [\*144] was removed into this \*court, and the plaintiff declared against him *de novo*; and avers it to be *pro eadem causa actionis pro qua levavit querelam suam præd' et præfertur*: and then he avers, that the cause of action did accrue within six years before his levying the said plaint in the sheriff's court, and therefore prayed judgment.

To this replication the defendant demurred, and showed for cause, that it did not appear by the plaintiff's replication, that his bill against the defendant in this court was for the same cause of action as that for which he levied his plaint in the court below. Upon which there was a joinder in demurrer: and several exceptions were taken to the replication. 1st. That it

(a) Stra. 719.

ought to appear, either by the proceedings themselves, or by sufficient words of averment, that the cause of action is the same in both courts; and in this case, it does not appear by any means upon the face of the proceedings, that the cause of action is the same in both courts; for the declaration in the inferior court is upon an *indebitatus assumpsit*, and the declaration here is upon a promissory note, which are causes of action manifestly different: nor is there any sufficient averment in the replication, to show the identity of the cause of action in the two counts; for the words, are only these, *quod* [the plaintiff] *exhibuit billam suam pro eadem causa actionis præd' ut præfertur*, which is not issuable; neither is it confined to the matter of the first count, as it ought to have been, but goes generally to the plaintiff's whole declaration in this court. 2dly. The causes of action appear plainly to be different; because, the declaration in this court being upon a promissory note, and the declaration in the court below being upon an *indebitatus assumpsit* for a different sum, they cannot be intended to be the [ \*145 ] same, for the promissory note could not be given in evidence upon the *indebitatus assumpsit*; and the two actions can never be intended to be the same, unless the same evidence will support both: and if they are different in their nature, no averment can reconcile them. 3dly. The plaintiff's declaration in the court below appears to be ill; for he has only declared, by way of general *indebitatus assumpsit*, for so much money, *per præd' def. præfat' quæd' prius debuit*, which is ill, because it does not show a consideration, or how the debt arose; which is what is always required, that the court may judge whether it is a matter proper for such an action: and though this method of declaring may in some places be warranted by custom, yet, in all such cases, the custom ought to be set forth specially, and it is not sufficient to say *secundum consuetudinem* generally: as in Rast. Ent. 550. where *consessit solvere* is held to be well, by alleging the custom to declare in that manner, otherwise it would be ill.

Raymond, Ch. J. The actions in the two courts are of such

a nature that they may be averred to be the same ; for the statute 3 & 4 Anne only gives an additional remedy upon promissory notes, but does not take away the old one : and I think this note might have been given in evidence upon the *indebitatus assumpsit* ; for the note imports the drawer's having so much money of the other's in his hands ; and though it may not, perhaps, be allowed in evidence in such case as a promissory note, without further proof of the consideration, yet it may undoubtedly be given in evidence on an *indebitatus assumpsit*, as a paper or writing to prove the defendant's receipt of so much money from the plaintiff. *Hard's case*, Salk. 23.

[\*146] And \*as the two actions may therefore be averred to be the same, so I take the averment to be sufficient and traversable ; and the averment is confined only to the first promise, which is singled out by the word *quoad* in the replication, and closed as to the rest. As to the objection that is made against the declaration in the inferior court, I think it of no weight ; for though the declaration should be ill, yet, if the plaint be regular, it is sufficient to prevent the statute.

Reynolds and Prebyn, Js. were of the same opinion.

But Fortescue, J. held strongly, that the two actions were of so different a nature, that they could not be averred to be the same. He agreed, that the variance in the sums did not prevent the averment of their being for the same cause ; but he held strongly, that, since the statute, a promissory note could not be given in evidence upon an *indebitatus assumpsit* ; and cited the case put by Hale, 1 Vent. 252. which is this : A., in consideration that B. would marry his daughter, promised to pay 100*l.* and in an action brought the plaintiff was barred ; and in another action brought, the promise was laid to pay the 100*l.* at request, and it was held it could not be averred to be the same. In the other points he agreed with the rest of the judges ; and said, that the form of declaring in the court below was well enough : that it had been so adjudged between *Ste-*

*phens and Greenland* in this court; and that the case in *4 Leon.* 105. was in point.

**Judgment for the plaintiff.**

\*And if a man sue in chancery, and, pending the [\*147] suit there, the statute of limitations attach on his demand, and his bill be afterwards dismissed, as being a matter properly determinable at common law, Lord Chancellor King said, (a) that in such case he would take care to preserve the plaintiff's right, and would not suffer the statute to be pleaded in bar to his demand.[1]

When the action is commenced, it must be duly continued;[2] and as the continuances are founded on the return of

(a) 1 Vern. 74.

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[1] If an action be instituted under the act of the 28th of March, 1797, (limiting the period for bringing claims and prosecutions against forfeited estates) within the five years thereby limited, and it abate by the death of the defendant who dies after the five years have expired, whether another action though instituted directly after, can be maintained, *Quære. Jackson ex dem. Frost vs. Horton*, 3 Caines' Rep. 197.

In an action of trover, brought by an administrator for the conversion of certain negro slaves, the declaration stated, that *J. F.* the intestate, died possessed of a negro woman named *Dinah*, in 1765; that *Dinah* and her issue came to the possession of the Defendant, and that administration was granted to the Plaintiff on the estate of *J. F.* in 1812. *Held*; That no right of action vested in any person to sustain an action of trover for *Dinah*, and her descendants, before letters of administration were granted to the Plaintiff. The act of limitations could not begin to operate before such letters were taken out, and did not attach until demand and refusal. *Fishwick's Admr. vs. Sewell*, 4 Harr. & Johns. Rep. 393

[2] Plaintiff sued out a writ which was returned, "not found, defendant is an inhabitant of another county." The plaintiff

the first writ, care should be taken that such writ be in fact returned; for if the plaintiff show a writ, and do not return it, that will not avoid the statute of limitations : (a) [3] unless there

(a) Ld. Raym. 883. Willes, 257.

then sued out *another* writ, not *appearing* to be an *alias*. The first writ cannot be connected with the second to avoid the Statute of Limitations. *Hume vs. Dickinson*, 4 *Bibb's Rep.* 276.

In the case of *The Schooner Harmony*, *Hewes Claimant*, (on appeal, 1 *Gall. Rep.* 123,) the vessel was libelled as forfeited for having unladen goods, &c. without a permit; and the District Attorney for the *United States*. moved for leave to amend and insert a new count; STORY, J. *delivering the Opinion of the Court*, said; "It has been further objected, that such amendments ought not to be allowed, because the Statute of Limitations has actually run against the forfeiture; and it would be in effect reviving a new right of action, which in an original information would be barred. That the Statute of Limitations would run against a cause of action then before the Court, has been held a good reason for allowing an amendment, as to such cause of action. (2 *Tidd.* 643, 644. 1 *Wils.* 144. *Say. Rep.* 235. *Cross vs. Kaye*, 6 *T. R.* 543. *Maddock vs. Hammett*, 7 *T. R.* 55.) But in such cases the Court will not admit an amendment, if it be to introduce a new substantive cause of action, or new charge against the defendant. (*Id. Ibid.* *Petre vs. Craft*, 4 *East.* 433.) Now I think this rule a perfectly reasonable one, and I shall adhere to it in this case. The amendment must be disallowed, because the cause of action would be gone on an original information; and it is clearly a new substantive charge."

[3] To save the Statute of Limitations, on the ground of unexecuted process, within the six years, the plaintiff must reply, that process was sued out and returned *non est inventus*; and connect it, by continuances, with the immediate process on which the defendant was arrested. And this replication must be sustained by evidence. It is not enough to shew that process was sued out, without being delivered to the Sheriff, or returned. The continuances may be entered at any time. *Baskins vs. Wilson*, 6 *Cow. Rep.* 471.

In order to save the Statute of Limitations, it is sufficient that the writ be sued out and the return thereon endorsed upon it in time. It is not necessary that the writ should be delivered out of

be only one writ, and the plaintiff declare thereon within a year

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the Sheriff's office as returned. . *Taylor & Al. Assignees, &c. vs. Hipkins & Al.* 5 *Barnew. & Ald. Rep.* 489.

A *Capias ad Respondendum*, to save the Statute of Limitations is mere matter of form ; and may be delivered to the Sheriff with instructions to deliver it *non est*. If it be by mistake issued in favor of the plaintiff, as executor, and the *Pluries* be in the plaintiff's individual character, *semble*, this is no objection. But if otherwise the first *Capias* may be amended, even after verdict. *Beckman & Al. vs. Satterlee*, 5 *Cow. Rep.* 519.

Where on a plea of *actio non accrevit infra sex annos*, it appeared that a writ of testatum special *capias*, was issued within six years in *Michaelmas* term, and an alias testatum *capias* in *Easter* term following, but no writ in *Hilary* term: *Held*, that this was sufficient to take the case out of the Statute, the suit being actually, although irregularly, commenced within six years, and the continuance in *Hilary* term might be supplied at any time. *Beardmore vs. Rattenbury*, 5 *Barnew. & Ald. Rep.* 452.

A writ was issued against A., within six years from the time the cause of action accrued. The plaintiff's attorney, finding that the demand was on a partnership account against A. and B., as of the day on which the writ was returnable, which was after six years had elapsed, and A. pleaded to this declaration, *non assumpsit* and the *Statute of Limitations*. This was held to be a commencement of a suit against A. and B. within six years. *Garland vs. Chattle & Al.* 12 *Johns. Rep.* 430.

In an action of *Indebitatus assumpsit*, the defendant pleaded *non assumpsit* and *non assumpsit infra sex annos* : The issue on *non assumpsit* was tried, and a verdict for the plaintiff. To the plea of the Statute of Limitations, the plaintiff replied, a writ of summons issued on a particular day within the six years, which was returned *nilil*. The Court *Held*, that the replication contained matter sufficient to prevent the bar of the Statute of Limitations, and gave judgment for the plaintiff. *Schlosser vs. Leshner* ; 1 *Dall. Rep.* 411.

Whether the institution of a suit in Equity will hinder the running of the Statute of Limitations, as well as a suit at law. *Quære* ; *Kerr's Lessee vs. Porter*, 1 *Tenn. Rep.* 353. 362.

Declaration in *assumpsit* containing several counts. Plea, *non assumpsit infra sex annos* ; replication as to the first ten counts, that plaintiff issued a bill of *Middlesex* in trespass, to which the



after it is returnable : he may, in that case, give the writ in evidence, without showing it to be returned. (a) But when there are two writs, the plaintiff cannot give them in evidence, without showing the first to be returned. (b)

It has been held, (c) that a bill of Middlesex, returnable the same day that it is sued out, is void, for that there could not be such a bill of Middlesex, and therefore would not avoid the statute ; (4) but in a subsequent case, (d) wherein the bill of Middle-

(a) 2 B. & P. 157.

(b) 6 T. R. 617.

(c) Raym. 772.

(d) 4 T. R. 610.

Sheriff returned *non est inventus*. The replication then stated various writs continuing the process, but did not describe them as *alias* and *pluries* writs, and the last had an *ac etiam* clause. The replication then stated that the first-mentioned precept was sued out by the plaintiff with intent to implead, and declare against the defendant for the several causes of action in the declaration mentioned, and accordingly the plaintiff did exhibit his bill. There was a special demurrer to this replication ; and it was *Held*, that the *ac etiam* writ was a good continuance of common process, and that the continuances need not be by *alias* and *pluries* writs. *Plummer vs. Woodburne*, 4 Barnew. & Cress. Rep. 625.

In an action in the Common Pleas, the question being, whether a debt was barred by the Statute of Limitations, the creditor proved an action commenced in the King's Bench six years before, and continuances regularly entered down to the term before the trial of the action in the Common Pleas ; *Held*, that the debt was not barred. RICHARDSON, J. said, "As long as a remedy was open by which the debt might have been recovered any where, it appears to me that it was not barred by the Statute." *Gregory vs. Hurrill*, 3 Brod. & Bing. Rep. 212.

A writ is sued out in a penal action within the time limited, returnable in *Easter* term, 1813, but which is never returned ; the issue is of *Hilary* term, 1815 ; it is objected that the action was not brought in time ; in answer, the plaintiff produces rules for time to declare from *Mic.* term, 1813, to *Trin.* term, 1814 : *Held*, that this was not sufficient evidence to connect the declaration with the writ, from which the Court could presume that the declaration had been filed in time. *Thislewood qui tam. vs. Cracroft & Al.* 1 Marsh. (Eng. Com. Pleas,) Rep. 497.

[4] A writ taken out against one administrator where several are appointed and qualified to administer on the intestate's estate,

sex was sued out on the 13th of February, returnable on the same day; for which reason a rule was obtained, calling on the plaintiff to show cause why the writ and the subsequent proceedings should not be set aside on the authority of that decision. \*On showing cause against this rule, [\*148] it was said, that whatever might have been the practice formerly, it was in every day's experience now, to sue out writs returnable as the present was; and that the court had repeatedly refused to set aside such writs. The court agreed that the practice was as stated by the plaintiff's counsel, and discharged the rule.

An attachment of privilege, if returnable on a general return day, is not void, but only voidable; and if it be returned and continued, will save the action.

In the case of *Karver v. James*(a) it was objected that the first writ was not good, because returnable on a common return day, whereas it ought to have been on a certain day, and therefore that all the continuances fell to the ground. And of that opinion was Mr. Justice Fortescue, A.: but the other judges, viz. Willes, Ld. Ch. J. Mr. Justice W. Fortescue, and Mr. Justice Parker, held that it was only voidable, and not void: and that, therefore, if it had been returned, it would have

(a) Willes, 268.

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is null and void, and will not prevent the Statute of Limitations from running against a debt. A second writ against all the administrators after a discontinuance of the first, will not cure the defect where the Statute has run before the lodging of the writ in the Sheriff's office. *Hopkins vs. The Administrators of McPherson*, 2 Bay's Rep. 194.

A judgment obtained against a testator in his life time, and not revived against his personal representative after his death, within five years from the time of such representative's qualification, is barred by the Statute of Limitations. The operation of the Statute will not be prevented by a *Scire Facias* sued out within the five years, on which the plaintiff suffered a non-suit. *Peyton's Administrator vs. Carr's Executor*, 1 Rand. Rep. 436.

supported the continuances ; that it was voidable, and not void, and that the sheriff was obliged to return it, was holden in Poph. 205. ; which is a stronger case than this, because there the *capias* was returnable on a *dies non juridicus*, namely, on All-Souls day. If, therefore, the sheriff had returned this writ, it would have been well enough.

So, in *Leadbeter, Executor, v. Markland, Administratrix*,<sup>(a)</sup> the court, on the same point, said, that the writ was not made returnable on an impossible day, nor on the same [ \*149 ] day that it was tested, like that of *Green and \*Revet*, which, by the course of the court, was equally impossible ; but upon a known day, at a competent distance ; contrary, however, to the strict rule of the court, which requires such writs to be returned on some certain day, before or after such days of general return. That, therefore, it was no nullity, but a mere informality, which the court, on application, would have amended. Besides, in *Green and Revet* the writ was so ill pleaded that it could not be clearly decided whether it was stated to be returnable on the day of the teste, or a year afterwards, both which were too absurd. And thought such an informal writ as the present was sufficient to bar the statute of limitations ; since, had the cause proceeded, and the plaintiff recovered, and afterwards judgment had been stayed or reversed for this irregularity, the plaintiff, by sect. 4. of the statute of limitations, would have a year's time to proceed in a new action after the judgment so reversed : which shows the spirit of the statute of limitations to be, that a suit actually begun, however informally or irregularly, should be sufficient to stop the limitation.

It was said by Lord Holt,<sup>(b)</sup> that upon pleading the statute of limitations, he always used to plead the return, and not the purchase, of a writ ; for it was the return that gave the possession of the cause to the court. And if one were to continue a *latitat* for several years, he must get the first returned ; upon

(a) Bl. 1131.

(b) 7 Mod. 5.

which return you make your continuances down, though you never take out another; but there must be a return to the first writ.

\*In replying, the plaintiff should show that the cause [\*150] has been regularly continued by *vicecomes non misit breve*, from the return of the writ to the time of declaring. Where, indeed, the plaintiff has been guilty of an omission, or mere irregularity, the court will interpose, and grant him an indulgence, for the sake of preserving the right of action; and it is on that ground that continuances are permitted to be added afterwards.(a)

It was said by Twisden, J.(b) that he knew a *latitat* to be continued five-years before the bill filed; the Secondary said, it might be continued seven. The continuances were considered a mere matter of form, and might be entered at any time;[1] and it has been holden that they may be made by the attorneys in their chambers.(c)

But an attachment of privilege is not a continuance of an action commenced by a bill of Middlesex, so as to avoid the statute of limitations.

(a) 3 T. R. 662.

(b) 2 Sid. 53.

(c) 2 Sid. 60.

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[1] The plaintiff cannot by omitting to enter continuances between the return of the *postea* and judgment, prevent the defendant's right to bring a writ of Error. And where the judgment is in fact rendered within five years, but, by omitting the continuances, it appears of record to be more than five years before error brought, the Court will order the continuances entered *nunc pro tunc*, so as to avoid the Statute of Limitations. *The President, &c. of the Manhattan Company vs. Osgood & Al.* 1 Cow. Rep. 65.

The continuances may be entered at any time. *Baskins vs. Wilson*, 6 Cow. Rep. 471. *Beardmore vs. Rattenbury*, 5 Barnw. & Ald. 452.

An action on the case<sup>(a)</sup> was brought upon promises, to which the defendant pleaded the general issue and the statute of limitations. The plaintiff replied, that within six years after the cause in the first count accrued, namely, on the 28th November, 1785, the plaintiff sued out a bill of Middlesex against the defendant and one John Astle, for the same cause of action, returnable Monday next after eight days of St. Hilary; that, on a return that those defendants were not found, another writ was issued, returnable Wednesday next after fifteen days from the day of Easter; that regular continuances were entered [ \*151 ] ed till Friday next after the morrow of All-\*souls; at which day the plaintiff appeared, and offered himself against the defendants in that plea; but the sheriff did not return the precept, nor did any thing therein; therefore the plaintiff, afterwards, on the 6th November, 1789, prosecuted out of this court against the defendant an attachment of privilege for the same cause of action, to which the defendant appeared, &c. And the plaintiff averred, that the bill of Middlesex first sued out and returned, and the several other writs, and the writ of attachment of privilege, were severally sued out with a view to exhibit his bill, or declare for the same cause of action as is mentioned in the first count. There was also a replication, as to the residue of the promises in the other counts, that the defendant undertook and promised, within six years before the exhibiting of the plaintiff's bill; on which last issue was taken. To the first replication there was a demurrer, and joinder.

On the trial, Lord Kenyon, Ch. J. said, it was true that if an action be commenced, though informally, to prevent the operation of the statute of limitations, it will have that effect if it be duly continued. But the question here is, whether the action were duly continued or not? The mode of continuing a bill of Middlesex, or *latitat*, is very familiar: it is in every day's practice. But here the plaintiff abandoned the proceedings on the bill of Middlesex, and sued out an attachment of privilege, which

(a) 3 T. R. 662.

bears no analogy to the former proceeding. He was, therefore, clearly of opinion, that this was not a continuance of the former suit, and that the replication could not be supported.

\*Ashhurst, J. In order to prevent the statute of [\*152] limitations from running, it is absolutely necessary, not only that a writ should be sued out, but that it should be regularly continued. Where, indeed, the plaintiff has been guilty of an omission, or mere irregularity, the court will interpose, and grant him an indulgence, for the sake of preserving the right of action, and it is on that ground we permit continuances to be added afterwards. But where it is admitted that the party has discontinued, he cannot sue out a writ of a different nature, and consider it as a continuation of the former action: he must pursue his action in the mode allowed by the court.

Buller, J. The word "continuance" is so plain and simple, that it is not capable of two interpretations. When we speak of writs being continued, we mean, that it must appear upon record, that the court has, from time to time, kept the original suit alive; and that the plaintiff is proceeding to bring the defendant into court on the suit originally commenced: but it must appear on the record, that it was a continuance of the original writ. Now here a bill of Middlesex was sued out, which was continued down to a certain time, when that proceeding stopped, and then the plaintiff sued out an attachment of privilege, which was not a continuance of the former writ, for it has no connection with it. The cases from Shower and Barnes were cited to show that an attachment of privilege was only as a *latitat*, and not as an original writ: but that proves that it is not a *latitat*; for *nullum simile est idem*. With respect to the instances put of a person becoming a member of parliament, or an attorney, after he is sued, it will be time enough to decide the \*former when it occurs; but [\*153] the latter is too clear to admit of a doubt; for he cannot avail himself of the privilege which is conferred on him af-

ter the action is brought: and if, in such a case, he were to plead his privilege, the plaintiff might reply, that the writ was sued out against him before he became an attorney.

Grose, J. The statute of limitations enacts, that all actions upon the case, &c. shall be commenced and sued within six years next after cause of action: but this suit was not commenced within that time; for a bill of Middlesex, and an attachment of privilege, cannot be said to be one and the same suit.

Judgment was given for the defendant.

What has been said with respect to the returning and continuing the process, which the plaintiff relies upon as the commencing of a suit, applies to the proceedings in the common pleas. And in that court, in the case of *Stratton v. Savignac*, the judges were clearly of opinion, that the mere circumstance of process sued out was not sufficient, since, probably, it might be for some other cause of action; and if allowed to operate in the way contended for, would open a door to much inconvenience, by enabling persons to keep such process in their pockets till such stage of the proceedings as they should be disposed to bring it forward.<sup>(a)</sup> And the method is, to return *non est inventus* on the first writ, and then to continue the writ by *vicecomes non misit breve*. But as to the necessity of showing the return and continuances, there seems to be a difference with respect to originals \*proper for the action, and the common *clausum fregit*: in the former case it has been held not necessary to show the return and continuance;<sup>[1]</sup> but in the latter it is always so.

(a) *Willcs*, 268.

[1] Where the plaintiff replies an original writ sued out, he must shew it to have been continued up to the time of trial. *Administrators of McDowell vs. Executors of Goodwyn*, 2 *Rep. Const. Court So. Car.* 441.

In an action of trespass<sup>(a)</sup> for taking cattle, plea; the statute of limitations, the plaintiff replied an original; to which there was a demurrer, and two causes assigned; the last of which was, because he did not plead the continuances upon the roll. Maynard, counsel for the defendant, answered, that it was not necessary to show, in the plea, all the continuances, but to plead so much of the record as went in bar. By Rolle, Ch. 9. the plea is plain; and it is not necessary to allege all the continuances, for here is an appearance.

To an action of *assumpsit* in the common pleas,<sup>(b)</sup> and the statute pleaded, the plaintiff replied an attachment of privilege, and that defendant did make such promise within six years next before the suing forth the said writ of privilege; to which the defendant demurred, because it did not appear by the replication when the attachment was returnable, nor that it was ever delivered to the sheriff, nor returned; and that four terms intervened between the teste thereof and the term the declaration was of, and therefore there ought to have been continuances of this writ of privilege. But the court of common pleas were of opinion, that an appearance to process cures all errors and defects therein, and gave judgment for the plaintiff, below.

\*A writ of error was brought upon this judgment; [\*155] and the general errors were assigned. For the defendant in error it was argued, that an attachment of privilege in the common pleas is in nature of an original writ; and if an original writ is replied to the plea of the statute of limitations, it is sufficient to show the teste of it when issued, without any continuances, according to the case of *Whitehead and Buckland*, Sty. 373. 401. But if a *latitat*, or a common *clausum fregit*, be replied, it must be shown that it was continued properly to make it the foundation of the suit. Carth. 234. And of that opinion was the court, after time taken to consider; and the judgment was affirmed.

(a) Styles, 373.

(b) 1 Wils. 167.



But since this case is *Styles*, and before that in *Wilson*, the rule has been otherwise.

In *Kinsey v. Haynard*, (a) Holt, Ch. J. said, Suppose you had pleaded a right, and a proper original, in this manner, as you have done here, you have not shown that it ever was returned; and till return there is no day in court; and there is no continuance shown to have been entered: and to prevent the statute it is not enough to take out a writ, even a proper one, but all the continuances, though for six or seven years, must be entered, and so shown to the court; for if there be an omission of one continuance, it spoils all. And for the discontinuance only was the judgment in the common pleas reversed, which judgment was affirmed in parliament.

In *Brown v. Babington*, (b) where the principal objection was to the writ being properly a commencement of [ \*156 ] the suit within time, Holt, Ch. J. said, that there was a fatal fault, viz. that the plaintiff did not show that the original was ever returned. Now, if he shows a writ and does not return it, that will not avoid the statute of limitations.

And in *Karver v. James*, (c) because the first writ (which was a writ of privilege) was not returned, all the continuances were void.

Where the action was commenced by original, and abated without the default of the plaintiff, he might have another writ by journeys accounts; but this is never now resorted to to save the action, such a case being always within the equitable construction of the fourth section of this statute.

(a) Latw. 460.

(b) Ld. Raym. 881.

(c) Willes, 255.

*Indebitatus assumpsit* (a) for an *assumpsit* to the testatrix. The defendant pleaded, *non assumpsit infra sex annos*. The plaintiff replied, that Charles Elstob was executor to Jane Elstob, *durante minoritate* of the plaintiff, and that he sued an action within six years, &c. against the defendant; and that pending the action, the plaintiff came of age, and brought this action by journeys accounts. The defendant demurred. And after several arguments at bar, it was resolved by the court—

1st. That if Charles Elstob had been administrator to Jane Elstob, *durante minoritate* of the plaintiff, and had brought an action, pending which the plaintiff had come  
\*of age; he could not have continued that by journeys [\*157] accounts, because he would not have come in in privity to Charles, but he had claimed immediately from the ordinary; and in such case the statute of limitations would have been a bar to the plaintiff, as it was adjudged in a case in the common pleas about four years before; where an administrator brought an action upon the brink of the six years, and pending that died; upon which the next administrator *de bonis non* brought another action, in which the statute of limitations being pleaded, the plaintiff replied, and showed all the special matter, how the former administrator brought an action, &c.: and it was adjudged that that could not aid him, because he did not come in in privity to the former administrator.

2dly. That this action was recently enough brought, for it appeared that it was brought within seven days after the plaintiff came of age. Heretofore they used to allow half a year to bring an action by journeys accounts, but now that is held to be too long, and therefore they allow but thirty days.

3dly. That this executorship being but an office, both persons make but one executor, and therefore the plaintiff was privy to Charles, and to the writ sued by him. See Owen, 134. Co. Entr. 923. Hob. 265. 1 Roll. Abr. 921. 11 Vin. 227. pl. 15.

(a) Ld. Raym. 288.

And by Treby, Ch. J. If Charles had obtained judgment, the new plaintiff, after his being of age, might have sued execution. But it was resolved, that if A. makes B. his executor, adding, that if he does such an act, C. shall be his executor; if B. bring an action, and then does the act, C. cannot have an action by journeys accounts, &c. because B. has determined his office by his own act; and though he was once sole and perfect executor of himself, yet, by the breach of the condition, he is now as if he had never been executor, and C. is not privy to him.

But in a subsequent case, wherein the law respecting the maintaining of writs by journeys accounts was much discussed, a different construction was held. The question was, as to the propriety of the first writ, and if that writ could be maintained by journeys accounts. The common pleas held, that the first writ being shown to be sued out, it should be intended to be returned and continued. But the court of king's bench, on error brought, reversed the judgment for want of continuances to the first writ; and the judgment of the king's bench was affirmed in parliament.[1]

The case was thus: The plaintiff(a) declared as administratrix to her husband, against the defendant, as executor to Heyward, in *indebitatus assumpsit*. The defendant pleaded, *non assumpsit infra sex annos*. The plaintiff replied, that her husband sued out a writ of *clausum fregit* returnable in this court, in which he intended to declare in *assumpsit* for this debt against Heyward; that Heyward died, and her husband sued another writ against the defendant; that then her husband died, and she

(a) Ld. Raym. 435.

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[1] At common law, no action could be renewed by journey's accounts, in a case of voluntary abandonment of suit. *Richards & Al. Assignees, &c. vs. The Maryland Insurance Company*, 8 Cranch's Rep. 84.

being administratrix to her husband, sued this writ, &c. The defendant demurred: and the court gave their opinions \*in solemn arguments on the bench: but the ar- [\*159] gument of the chief justice only is reported.

Treby, Ch. J. 1st. In this case the writ is not maintainable by journeys accounts; for a writ by journeys accounts is maintainable only by the same plaintiffs, or one of them at least, who sued out the first writ: but where the plaintiff dies, a writ by journeys accounts cannot be brought by his executor, &c. And this appears by the terms of the law, Fitzherbert and Stratham, in title Journeys Accounts—If the defendant dies, there the plaintiff may pursue a writ by journeys accounts against his executors, &c. if there are two plaintiffs, and one of them dies, the survivor may have such a writ, he being the same person who sued the former writ; but a writ by journeys accounts is maintainable in no case but by the same plaintiffs, or some of them, who were plaintiffs in the former writ; but in no case shall be brought by an executor, or heir, &c. Rast. 107, 108. 417. 3 Cro. 174. Bro. Journeys Accounts. 28 Thelsal. 407. b. 1 Vent. 235. And without doubt, there have been several occasions offered to bring such a writ by executors, &c. which would have been brought, if the law would have allowed it. And the case of *Elstob v. Thoroughgood*, adjudged in this court, Mich. 9.Wm. III. A general executor brought a writ by journeys accounts upon a writ brought by the executor *durante minoritate*, and adjudged that the said writ was well brought. And he said, that he was then of the same opinion; but he never was ashamed to retract his opinion, when he is convinced upon better reason; and for this reason he declared, that he thought the said judgment was not maintainable upon the reasons upon which it was given, viz. that an executor may have a writ \*by journeys accounts upon a writ [\*160] abated, brought by the executor *minoritate*; but the judgment, notwithstanding, well given upon other reason. But in no case can a writ of journeys accounts be, but by the same plaintiffs, or some of them, who were plaintiffs in the former

writ. And to say that the general executor, and the executor *durante minoritate*, were as one person in the office, is to strain the point too far; for it must be the same plaintiff, not only by representation, but by name; for the second writ is a continuance of the first; which cannot be but by the same person, not only in representation, or in respect of their office, but strictly and truly the same person.

2dly. In this case the writ cannot be by journeys accounts, because the former writ ought to be continuing in court and returned. Fitzh. Journeys Accounts. 22 Rast. Entr. 417. 11 H. VI. c. 34. For the writ is not in court before it is returned; but, in this case, it does not appear that the first writ was returned.

3dly. In this case the first writ was a *chancery writ*, which writ is not maintainable, nor can be continued, against executors; and the second writ ought always to be the same as the first; and usually they were entered upon the same roll, and both together made only one record.

4thly. In this case there is nothing of journeys accounts before us, for the second writ is not said to be brought *per diem computatus*, as all the precedents are; though the meaning of the said words he did not well apprehend. The word [ \*161 ] *diem* signifies a day's journey, and the best account of the word is given by Selden; that the chancery being a moveable court, and following the king's court, and the writs being to be purchased out of the said court, the party who purchased the second writ ought to have applied to the king's court as hastily (that he might obtain the second writ) as the distance of the place would allow, accounting twenty miles for every day's journey; and for this reason he was to show in the second writ that he had purchased his second writ as hastily as he could, accounting the day's journeys he had to the king's court. It has been urged by the counsel, that the death of the plaintiff being the act of God, shall not do a prejudice to any;

and the executor of such person dying ought not to be prejudiced by the testator's death, to lose a writ which was well commenced. Answer, that the said rule, viz. *quod actus Dei nemini facit injuriam*, admits of several exceptions, and it will prejudice the party in divers cases. The statute *de bonis asportatis*, &c. is an instance; for at common law, before the said statute made, by the act of God executors were prejudiced in *quare impeditis*; and in all actions and cases where damages only are recoverable, which arise *ex delicto*, unless in cases which arise upon deeds or contracts. A pawn is not redeemable after the death of the pawnor. In appeal the next heir dies after the appeal brought, the appeal is lost. And, for this reason, the said rule will not support this writ by journeys accounts.

And in the case of *Hayward and Kinsey*,<sup>(a)</sup> Holt, Ch. J. observed, that as to the journeys accounts, the plaintiff's intestate brings an action within six years; and it is proceeded, and pending it the plaintiff dies, \*and six years are [\*162] elapsed in the interim, it were reasonable that the administrator might have another action within convenient time, and have benefit of the first action for the preservation of the right against the statute, as the practice has been in cases of outlawry. But if an heir in tail bring a formedon within five years after a fine levied by a third person, who is not his ancestor in tail, but a discontinuee for the purpose, and pending it, and after the five years, the issue dies, whether the next heir in tail shall have benefit of this formedon, by bringing a new one in convenient time? It were reasonable he should, but this has not been determined. And it is plain journeys accounts will not lie in this case; for the rule is, that it must be between those that were parties to the first writ. And besides, the new writ is to be the same with the former; and the writ that lay for the ancestor, or for the testator, is not the same that lies for the issue or executor, but one of another nature. If an assise be brought within twenty years after a disseisin, and before judg-

(a) 12 Mod. 571.

ment twenty years pass, and then the demandant dies, the heir cannot have another assise, but he must have a writ of entry; and it will be hard to prove the heir can proceed by journey's accounts in that case; for it is another writ he is entitled to now by the death of his ancestor; yet still he may be out of the statute of limitations,

*Of the Fourth Section.*

THE time within which actions are, by the third section, directed to be brought, is enlarged by the words, and by an equitable construction of the fourth section,[1] which enacts,

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[1] *Vide page 118, note [1.] & page 119. note [1.]*

In the case of *Alexander & others vs. Pendleton*, (8 Cranch's Rep. 470.) MARSHALL, Ch. J. delivering the Opinion of the Court, said; "But if Charles Alexander had permitted that [a former] suit to be dismissed, and had filed a new bill, he would not have been at liberty, in the computation of time to avail himself of the pendency of the former suit, unless he could have connected the two suits together. The law is the same where a suit terminates by abatement and is not revived, such a suit takes no time out of the Act of Limitations."

In the case of *Cawood vs. Whethcroft, Admr. &c. 1 Har. & Johns. Rep. 103.*) which was an action of *assumpsit*; the writ issued on the 11th January, 1797; and the declaration contained sundry counts. The defendant pleaded several pleas, and amongst others, "*non assumpsit intestatoris infra tres annos.*" The plaintiff replied to this plea, that he did, within three years after the cause of action accrued, towit on the 1st of March, 1784, for the recovery of damages, &c. prosecute a writ of *capias ad respondendum*, out of Charles County Court, against the intestate, and the proceedings in the said action were set out, shewing that the same was referred to Arbitrators in 1786, and that no award being returned, it was at the instance of the plaintiff, by order of the Court, struck off in August, 1796, and that the present suit was brought within one year afterwards, towit, on the 11th of January, 1797. The defendant demurred to the replications; and the General Court ruled the demurrer good, and gave judgment for the defendant.

Though the Statute of Limitations commence running, if suit be brought within time, and the defendant dies, and no letters testamentary are taken on his estate till the three years have expired, the Statute is no bar if a new suit be brought without delay against the executor. *Parker's Exors. vs. Fassitt's Exors.* 1 Har. & Johns. Rep. 337.



"that if, in any of the said actions or suits, judgment be given

In an action of trespass *quare clausum fregit*, the Statute of Limitations was relied on in bar of the suit, but it appearing that the plaintiff had formerly commenced a suit in this Court [*provincial Court*,] within three years next after the cause thereof first accrued; and recovered a judgment, which was reversed in the Court of Appeals; that the said former suit was brought for the same cause of action as the present suit; and that the present suit was brought within one month after the said reversal; It was *Held*, that the Statute was no bar; and judgment was given for the plaintiff. *Drane vs. Hodges*, 1 *Har. & McHen. Rep.* 518.

In the case of *Schnertzell vs. Chapline*, (3 *Har. & McHen. Rep.* 439.) which was an action of assumpsit on a promissory note dated the 27th of *March*, 1789 payable on demand. The original writ issued on the 25th of *October*, 1793. The defendant pleaded the Statute of Limitations. To which the plaintiff under the Statute of 21 *Jac.* 1. s. 16 c. 4. replied a former suit, wherein the judgment was arrested. To this replication the defendant demurred generally; the Court gave judgment upon the demurrer, for the plaintiff.

The Act of Limitations had run about eighteen months, then the plaintiff sued, and his action was continued in court about four years, and then he was nonsuited, and upwards of 12 months after that he renewed his action, and the defendant pleaded the Statute of Limitations.—*Per CURIAM*; *HAYWOOD* and *STONE*, Justices. "If a suit be instituted before the three years, are expired, and "there is a nonsuit after the three years, the plaintiff may sue again "within 12 months, and then only the time elapsed before the first "action shall be counted." But whether if the action be commenced after 12 months from the nonsuit, the time between the commencement of the first action and the nonsuit shall be counted, or only the time before the commencement of the first action, and the time after the nonsuit and before the commencement of the second action? *Quære.* *Anonymous*, 2 *Hayw. Rep.* 63.

Detinue for negroes. It appeared these negroes had been given by will, to the widow of the Testator for life; and after her death to the plaintiffs. She married, and her husband sold them to a person under whom the defendant claimed. And after her death, whilst in the possession of the defendant, or the vendee, these plaintiffs sold them. The purchaser sued and was nonsuited, because his action was improperly commenced. Then the plaintiffs sued in the present action, but before its commencement the three years had elapsed, and the question now was whether the verdict which had been given in the former action could now be given in

for the plaintiff, and the same be reversed by error, or a verdict

evidence: and after much argument the Court decided it could not; for that between the vendor and vendee of a chose in action there is no privity which the law will recognize. *Halseys' Administrators vs. Buckley*, 2 Hayw. Rep. 234.

A Judgment in Ejectment never executed, and under which possession has never been surrendered, does not stop the running of the Statute of Limitations. *Smith vs. Hornback*, 4 Litt. Rep. 232.

The right to issue a *scire facias* upon a judgment, is not barred by the Act of Limitations in a case where execution was issued in due time, and returned "no effects," though more than ten years elapsed between the return of the execution and date of the *scire facias*. *Gee vs. Hamilton & Ux.* 6 Munf. Rep. 32.

A bill of review to a decree pronounced before the 11th of February, 1814, (see acts of 1813, c. 12, §3.) could not be revived after five years had elapsed from the date of such decree. *Shepherd vs. Larue*, 6 Munf. Rep. 529.

The three years limited for the prosecution of a petition for review, are to be computed from the term of which the judgment was entitled. *Leighton vs. Lithgow*, 2 Greenl. Rep. 114.

A Judgment in ejectment was entered for the plaintiff at September term 1807, with an agreement, that execution should not issue thereon before the decision of the Court of Appeals in the case of *D.* against *P.*; and that if that judgment was reversed, then the above judgment was to be struck out. On this judgment the defendant brought a writ of error on the 3d of July, 1811, and the judgment referred to was affirmed in the Court of Appeals at December term 1813—Held, that the writ of Error be quashed, it having been sued out after three years had elapsed from the time of the rendition of the judgment. *Dorsey vs. Dorsey's Lessee*, 4 Harr. & Johns. Rep. 216.

Where a confession of judgment by way of *supersedeas*, was entered into on the 17th of November, 1815, to stay execution, agreeably to the act of 1814, ch. 84. [*Maryland*,] on a judgment rendered on the 9th of May, 1815, and a writ of error issued on the 2d of February, 1822, to remove the proceedings on the judgment by confession. Held, that the writ of error be quashed, more than three years having elapsed from the judgment by confession and the issuing the writ of error. *Andrews & Al. vs. Bosleys*, 6 Harr. & Johns. Rep. 99.

pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

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The Statute 1793, c. 75, §2. Which enables a party whose action has failed through unavoidable accident, informality, &c. to commence a new action, which but for this Statute would have been barred by the Statute of Limitations, does not apply to actions of slander or other actions arising *ex delicto*. *Cook vs. Darling*, 2 *Picker. Rep.* 605.

If *narr. in ejectment* is served within six months after the decision of a *caveat*, though not entered on the docket, it will take it out of the 11th section of the act of 3d April, 1792, [*Pennsylvania*.] *Lessee of Nicholson vs. Wallace*, 2 *Yeates' Rep.* 416.

The statute limiting suits for the recovery of disallowed claims against the solvent estates of deceased persons, (tit. 32. c. 1. §18.) to six months after notice that the claim was disallowed, "is a positive bar, not removeable like other Statutes of Limitation, by a new promise or a recognition of a subsisting debt; because it is not bottomed on a presumption that the debt is paid—avoidable by the slightest acknowledgment." The commencement of a suit takes place at the service of the writ in that suit. Therefore, where an action of *debt* on a record of the County Court, shewing an adjustment and liquidation of a conservators account, made, on the application of his administrator, after his death, and finding a certain balance due from his estate, was brought within six months after notice of the disallowance of a claim for such balance, in which final judgment was rendered against the plaintiff; it was *Held*, in a subsequent action of *account* for the recovery of the same balance, brought after the expiration of the six months, that such action was barred by the Statute. And PETERS, J. in delivering the Opinion of the Court, said; But the actions are not 'for the same matter, cause and thing,' as claimed by the plaintiff's counsel. One is debt; the other, account: and they have no more effect on each other, than trover and ejectment for the same land." *Spalding vs. Butts & Al. (In Error.)* 6 *Conn. Rep.* 28. 30.

The plaintiff declared in the common pleas<sup>(a)</sup> in *assumpsit*, supposing that the defendant, 16 Jac. I. at Bury, in Suffolk, promised to pay, &c.

\*After verdict and judgment upon *non assumpsit* [\*164] pleaded and found for the plaintiff, the defendant brought error; and upon dimunition alleged, the original was certified to be in Hilary term, 4 Car. I. upon which the plaintiff in the writ of error pleaded the statute of limitations; and that the action, being upon a promise in 16 Jac. I., and not brought within six years after the promise, nor within three years after the statute, was not maintainable. The defendant pleaded that he, 2 Car. I., which was within three years of the statute, brought a writ original of *assumpsit*, supposed to be made in Kent, against the defendant, now plaintiff in the writ of error, wherein he was outlawed; but in 3 Car. I. the outlawry in the common pleas was declared void, and he discharged; and that within a year after he brought this action, and supposed the promises made at Bury to his damages of 600*l.*; and that, in the former action, the *assumpsit* was alleged to be made in Kent to his damage of 500*l.*; and he averred that it was one and the same promise and cause of action. Upon this plea the plaintiff in the writ of error demurred.

Twisden showed the cause to be, for that this new action varied in the county from the *assumpsit*, and in the damages alleged, and so could not be intended one and the same cause of action, nor to be a new suit begun for the same matter.

Also, Croke, J. conceived, that forasmuch as this outlawry was not reversed by error, but avoided by plea, the first original was not determined, but he might have proceeded thereupon; and then, to begin a new original, \*and in [\*165] another county, is not according to the statute of limitations, nor within the intent of the statute.

(a) Cro. Car. 294.

But Richardson, Jones, and Berkley held, that this variance of the county and damages was not material to the action, being transitory, and averred to be for one and the same cause : and although the outlawry is not reversed by a writ of error, but avoided by plea, it is all one within the intent of the statute ; for the statute is not where the outlawry is reversed by error, but where the outlawry is reversed, so it is by any means. Therefore, upon their three opinions, a rule was given that judgment should be affirmed.

So, in trespass for taking and detaining plaintiff's beasts till a fine was paid,(a) and the action laid in Sussex ; the defendant pleaded that the cause of action did not accrue within six years before suing of the writ ; and the plaintiff replied that at another time he brought an original in battery in London, intending, when the defendant had appeared, to have declared for this trespass ; and that the defendant was outlawed in London ; and that, within such a time after the reversal of the outlawry, he declared here : to which the defendant demurred ; and it was insisted, that the original being laid in London, the plaintiff could not, in this action, declare in another county, though the cause of action be transitory. But, upon information by the prothonotaries that the course of the court was, that although the original be laid in London for expediting the outlawry, yet, when the defendant comes in, the plaintiff may declare against him in another county, be the action local or [ \*166 ] transitory : and the statute of limitations giving to plaintiffs generally a power to commence a new suit within the year after the outlawry reversed ; that so he may do in that case to warrant his declaration within the course of the court. Judgment was given for the plaintiff.

But where, to an action on the case by an executrix,(b) for money lent by the testator, &c. the defendant pleaded the statute of limitations ; and the plaintiff replied, that the testator

(a) 3 Lev. 245.

(b) Nels. Abr. 82.

filed a special original in trespass upon the case, against the defendant, setting forth the whole declaration; and that, *pendente placito*, her husband died. And upon demurrer, the question was, whether this action, brought by the testator by original, be within the equity of this section of the statute of limitations?

In this case the action was brought by original by the testator, but he died before the defendant could be outlawed; and it was held that his executrix could not maintain this action within the year; but it was a hard case, and the statute had not provided for it.

This has, however, been since overruled: and in cases wherein the progress of the action has been arrested by the death of either of the parties to the suit, a reasonable time has been allowed, within which a fresh action may be brought. [1]

In an action (a) wherein the plaintiff declared as administratrix against the plaintiff as executor, on a promise to the intestate by the testator, the defendant pleaded the statute of limitations. The administratrix replied, that \*the [\*167] intestate sued a writ of *clausum fregit*, returnable in the common pleas, in which he intended to declare in *assumpsit* against the defendant's testator; that the testator died, and that the intestate took out another writ against the defendant; that intestate

(a) *Ld. Raym.* 434.

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[1] Upon the death of an assignee under the Bankrupt Law of the United States, the right of action for a debt due to the bankrupt, vested in the executor of the assignee. If an executor do not cause himself to be made party to a suit brought in the life time and in the name, of the Testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the equity of the exceptions to the Statute of Limitations. *Richards & Al. Assignees, &c. vs. The Maryland Insurance Company*, 8 *Cranch's Rep.* 84.

CH. 7.]      *Of the Fourth Section.*

died, and plaintiff, being administratrix, sued out this writ ; to which was a demurrer : and the question was, if such writ could be maintained by journeys accounts ?

Treby, Ch. J. in giving judgment, said, That which is said by Coke, 6 Rep. 10. b. Spencer's case, is law ; that an executor, &c. shall not have a writ by journeys accounts. But though this writ is not good to continue the former, and by such means to avoid the statute of limitations, yet, the plaintiff here ought to recover notwithstanding the said statute pleaded. For the statute is, that actions upon the case, &c. shall be sued within the six years, &c. : and for this reason, where an action is sued within the six years, that seems to be excepted out of the words of the statute ; and that if an action is sued within the said time, the party is out of the proviso of the act, and at liberty to prosecute the said action, or to sue another action, at any time not restrained or limited by the statute. And in this case an action was commenced within the six years, though the former was a writ of *clausum fregit*, and this is an *assumpsit*, yet, by the course of the court, it is the same action ; the *clausum fregit* being a general writ, upon which a man may declare in any other personal action, as a *latitat* in the king's bench. And therefore the statute is satisfied in this case by the suing of the *clausum fregit*, and the plaintiff thereby set at liberty out of the [ \*168 ] \*restraint of the said statute. And if a copyholder has a license to make a lease, his lessee may make an under lease ; for, by the license, it is exempt from the custom of the manor. 1 Rol. Abr. 508. pl. 14. 6 Vin. 120. pl. 5. But though, by the suing of an action, the party seems to be set at liberty, without any restraint of time in which he ought to prosecute his action, or to bring a new action, yet, by the reason of the statute, he ought to be restrained to some reasonable time : for the statute being made for settling some time for the bringing of actions, it ought to be expounded according to such intent ; and where the words are silent, a reasonable time by construction ought to be made. But it is difficult, in this case, to settle in what time an action shall be brought, where another

action hath been commenced within the six years. But it seems to me, a year ought to be a reasonable time ; for it is the time in which the law delights, as may be instanced in many cases. Co. Litt. 254. b. 2 Inst. 476. Plowd. 353. *Stowell and Zouche's* case. For though the statute binds the right of the party, and therefore ought to be taken strictly, yet the party shall be bound to some reasonable time ; and a year being the time which the law, in many cases, adjudged reasonable, (see 2 Keb. 764.) therefore, in his opinion, if a writ be brought within six years, although it be discontinued by death, &c. and the six years expire, yet the statute of limitations will not be a bar, if another action be commenced in reasonable time ; and a year shall be said a reasonable time.

And the time will not be enlarged, except under special circumstances.

\*Case(a) by the executor of the executrix of George [\*169] Wilcox against the defendant, upon a promissory note; dated 30th July, 1719. The defendant pleaded, *quod causa actionis non accrevit infra sex annos*. The plaintiff replied, that the first executrix, Trin. 11 Geo. I. sued out a bill of Middlesex against the defendant, returnable Mich. sequen. on which there was a continuance by *non misit breve* ; and an *alias* was taken out, returnable in Hilary term following, before which the executrix died, and made the plaintiff her executor ; who, in Michaelmas term, 3 Geo. II. sued out a *latitat* against the defendant, with intent to declare against him as above, which he accordingly did ; and concluded with an averment, that the cause of action accrued within six years before suing out the first bill of Middlesex. To this the defendant demurred : and after several arguments, it was held, that the replication was ill, there being four years between the death of the first executrix and the proceeding by the new plaintiff : that the most that had ever been allowed was a year, and that within the equity of the proviso in



the statute which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed: but they said they would not go a moment farther, for it would let in all the inconveniences which the statute was made to avoid. Indeed, if the second executor had been retarded by suits about the will or administration, and he had shown that in pleading, it would have been otherwise, because then the neglect would have been accounted for. And wherever a suit is allowed to be continued by journeys accounts, it must be a recent prosecution, (6 Co. Spencer's case,) which this can never [ \*170 ] \*be said to be. *Per Curiam*.—Judgment for the defendant.[1]

No precise time, indeed, seems to have been fixed; but, in the report of the above case in Fitzgerald, Lea, J. said, I think it should be in the nature of journeys accounts, which is taking up and pursuing the old action in a reasonable time; which is to be discussed by the direction of the justices. 6 Co. Spencer's case. And by the same rule, I think what is or is not a recent prosecution in a case of this nature is, to be determined by the discretion of the court, from the circumstances of the case: but, generally, the year in the statute is a good direction.

And it has been held, that an action by original, brought by an administratrix within six years after the cause of action accrued, would enable the administratrix and her husband (whom she afterwards married) to recover in an action by bill by both, notwithstanding a plea of the statute of limitations.

*Broderick Lord Viscount Middleton v. Forbes & Wife*, (a) error in the exchequer chamber. On the pleadings the case was this. Forbes and Eliza his wife, administratrix of John Couchmaker,

(a) Willes, 250. in notis.

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[1] Vide *Brown's Executors vs. Putney*, on appeal, 1 Wash. Rep. 302. (cited *Post*, page 172, note [1].)

her late husband, brought their bill in the king's bench against the defendant (the plaintiff in error) for moneys laid out by the intestate. The defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*. The plaintiffs replied, that Eliza, when a widow, ss. on the 2d January, 18 Geo. II. brought her original writ, and before the return she married Forbes; \*and they recently afterwards, 14th January, 19 Geo. [\*171] II. exhibited their bill against the defendant. The defendant rejoined, that Eliza married T. Jekyll, who was alive on the 5th June, the time of issuing the original. The plaintiffs surrejoined, and tendered an issue; to which the defendant demurred.

Upon judgment given for the plaintiff in the king's bench, without any argument, a writ of error was brought in the exchequer chamber: where Ford, ~~for~~ the plaintiff in error, argued, that the suit was abated by marriage, the voluntary act of the party: that the statute 21 Jac. I. c. 16. s. 4. was a law of peace for the security of property, and ought not to be extended by construction. 1 Lev. 31. 1 Lutw. 261. 6 Co. 9, 10. Besides, a suit commenced by bill cannot be continued by original.

For the defendants in error it was insisted, that there was no discontinuance; that the new suit was brought within a reasonable time, namely, within two terms, whereas it has been holden that a year is a reasonable time. *Hayward v. Kinsey*, 1 Lutw. 256. 1 Ld. Raym. 432. 2 Inst. 476.; that the statute of limitations ought not to receive a literal, but an equitable, construction. 2 Saund. 120. 2 Mod. 71. and 1 Lev. 31. As to the commencement of the suit by original, and the suit afterwards by bill, the reason for it is evident: then the defendant was in custody of the marshal; and being in such custody, the plaintiffs could only proceed by bill. It is also observable, that this is a suit *jure alterius*, and not *in jure proprio*.

[\*172] \*By the court,—The statute has received a favourable construction. The suit was originally brought within the six years, and the new suit within two terms. No disability can be pleaded to an administratrix: and the statute does not bar the action; it only takes away the remedy. T. 5 Geo. II. B. R. *Wilcox v. Huggins*. P. 9 Geo. II. B. R. *Usherwood v. Nevill*. Salk. 454. And the judgment of the king's bench was confirmed by all the justices and barons. MS. Abney, J.

And a *capias* taken out by the executor of an attorney will enable him to maintain a suit commenced by attachment of privilege. But although these actions, maintained upon that previously commenced and abated, are not required to be brought by those only who could maintain the writ by journeys accounts; nor that the same process should be used; nor even that the previous action should be carried on in the court in which the subsequent one is commenced; yet, to maintain such subsequent action, the former one, be it commenced as it might, or in whatsoever court, should be commenced according to the form of that court, and be duly continued there.[1]

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[1] *Vide Hume vs. Dickenson*, 4 *Bibb's Rep.* 276. (Cited ante page 147 Note [2.]) *Kerr's Lessee vs. Porter*, 1 *Tenn. Rep.* 362. (Cited ante page 147. Note [3.])

If an action on the case be brought within six years, and after the expiration of that period the plaintiff be *nonsuited*, the act of Limitations is a good plea to another action for the same cause. *Harris vs. Dennis*, *Admr. &c.* 1 *Serg. & R. Rep.* 236.

In detinue a replication to a plea of the Statute of Limitations, alleging that within five years after the accrual of the cause of action, a suit was brought and nonsuit suffered after issue joined, and jury sworn, and that within one year thereafter the pending action was brought, is not sufficient. *Montgomery vs. Caldwell*, 4 *Bibb's Rep.* 305.

The operation of the Statute will not be prevented by a *scire facias* sued out within five years on which the plaintiff suffered a nonsuit. *Peyton's Administrator vs. Carr's Executor*, 1 *Rand. Rep.* 436.

Therefore, in an action upon promises, (a) to which the de

(a) Willes, 255.

But in *Chretien vs. Theard*, (2 Mart. Rep. N. S. 582,) it was Held, That prescription is interrupted by an action in which the plaintiff is nonsuited.

If a bill in *Chancery* be dismissed on the ground that the plaintiff's claim is exclusively cognizable *at law*; he cannot plead the pendency of such suit in *Chancery*, to prevent the Act of Limitations from being a bar to his subsequent recovery *at law*. *Gray's Administratrix vs. Berryman*, 4 Munf. Rep. 181. Same Point, *Elam vs. Bass' Executors*, *Ibid* 301.

In the case of *Brown's Executors vs. Putney*, (On Appeal, 1 Wash. Rep. 302,) Putney brought an action of *assumpsit* against the appellants in the Court below; and the jury, by consent, found a verdict for the plaintiff, subject to the Opinion of the Court upon the following case, viz: That no *assumpsit* was proved after the 27th of March, 1786, and that the writ in this suit issued the 23d of August, 1791: that to avoid the Act of Limitations, the plaintiff produced a writ which issued for the same cause of action, from the Court of Hustings of Williamsburg, dated the 24th of October, 1786, and which was not served upon Brown; but in November following it abated and was dismissed as to him, he being returned *no inhabitant*: that the same writ was served upon Eaton, another defendant, and abated by his death in August, 1787. The verdict and judgment in the Court below, [*District Court of Williamsburg*,] was in favor of the plaintiff, from which the defendant appealed. The President of the Court of Appeals, (PENDLETON,) delivered the Opinion, as follows: "The plaintiff according to the decision in the case of *Wilcocks and Huggins*, "[2 Str. Rep. 907,] would have been entitled to the benefit of the proviso in the Act of Limitations, under the equity thereof, if he had recommenced his suit within a year after the former suit was abated. But as four years had nearly elapsed between the abatement of that suit, and the bringing of the present, he cannot avail himself of the proviso, but is barred. The judgment must be reversed and entered for the defendant."

To a plea of the Statute of Limitations by an executor of an estate represented insolvent, it is not a sufficient answer to say that the estate is solvent, and that after the lapse of four years, a further time was allowed by the judge of probate for creditors to exhibit and prove their claims; under which the demand in suit was duly proved. *Parham vs. Osgood & Al. Exors*, 3 Grec. Rep. 17

defendant pleaded the statute of limitations, the plaintiff replied, that his testator, who was one of the attorneys of common pleas, on the 26th of April, in Easter term, 5 Geo. II. sued out a writ of privilege against the defendant, to answer him in a plea of trespass on the case on the morrow of the [ \*173 ] Holy Trinity then next; but that \*the sheriff of Herefordshire (to whom it was directed) did nothing thereupon, nor did he send back the said writ; therefore the plaintiff's testator sued out another writ, &c. returnable in the then next Michaelmas term, &c.; and so on twenty other writs of the same kind, stating them, and the days they were returnable; but it stated that neither of them had been returned by the sheriff, and it did not state that any one of them had ever been

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Whether an *application* to the judge of Probate *within* four years from the granting of letters of administration, for further time for creditors to exhibit and prove their claims, is equivalent to a *suit* so as to prevent the operation of the Statute of Limitations, the new commission not issuing till *after* the four years;—*Quære? Ibid.*

The recovery of a claim against the [estate of a deceased person, which originates after, or, from its nature, cannot be ascertained within, the time limited by the Court of Probate for the exhibition of claims, is not barred by the non exhibition of it within such time. Therefore, where A., in 1775, conveyed land to B., with covenants of seisin and warranty, and, in 1789, died, leaving real and personal estate; the debts then outstanding were paid from the personal estate; the real estate was distributed to the heirs and devisees; and the estate was settled in the usual manner; more than thirty years afterwards, viz. in 1820, C. evicted B. in due course of law, from the land conveyed to him by A., in 1775; an administrator *de bonis non* on A.'s estate being appointed, B. exhibited his claim against the estate for a breach of A.'s covenant of warranty, which was allowed; the personal assets being exhausted, the Court of Probate granted to the administrator an order for the sale of land, to pay such claim; in pursuance of which, he sold a part of the land distributed to the heirs and devisees, which had been conveyed to, and was in the possession of, a *bona fide* purchaser; it was *Held*, that such land was subject to a lien, which the distribution, the limitation of claims, the alienation and the lapse of time, did not extinguish; and that the sale was, therefore, legal. *Griswold vs. Bigelow*, 8. Conn. Rep. 259.

delivered to him : that before the return of the last writ, namely, on the 28th of July, 1737, B. Karver (the plaintiff's testator) died ; recently after whose death the plaintiff sued out the writ (a *capias*) in this case, in Trinity term, 11 & 12 Geo. II. for recovering the damages by reason of the not performing the several promises in the declaration mentioned ; that the several writs of privilege so prosecuted by B. Karver in his life-time against the defendant, were prosecuted by him with an intent to have impleaded the defendant of and upon the several promises in the declaration specified ; and that the writ so prosecuted by the plaintiff against the defendant, was prosecuted against him with intent to implead him for the cause of action in the declaration specified ; and upon his appearance, to declare against him for the said several causes of action ; and that he, (the plaintiff,) according to his said intention, afterwards, on, &c. declared against the defendant here, &c. with an averment, that the several causes of action accrued within six years before the suing out of the writ of privilege first above specified by B. Karver, &c.

To this replication the defendant demurred specially, and showed for cause of demurrer, that the writ of \*privilege first above specified was void for want of a [\*174] sufficient return, &c.

And of such opinion was the court, and the defendant had judgment.

*Of the Proviso contained in the Seventh Section.*

HAVING considered what acts of the party plaintiff prevent the statute from attaching on his cause of action, we come next to the cases excepted by the legislature out of its operation by the seventh section.[1] It is enacted, that if any person that

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[1] The defendant's discharge, under the insolvent act of the 3d April, 1811, will not prevent the Statute of Limitations from running against an action of assumpsit upon a contract made before the act; though the money did not fall due upon the contract till after the discharge. *SAVAGE, Ch. J. delivering the Opinion of the Court*, said; "By the 2d proviso to the 5th section of the 'Act of Limitations, [1 R. L. 186.] excuses for disability in the plaintiff, are confined to infancy, coverture, insanity, or imprisonment. The only excuse allowed by the statute, arising from the act of the defendant, is his being out of the state when the cause of action accrued. Though the defendant's virtual protection from prosecution by his discharge, produces the same result as his absence from the state, yet we are not warranted by any rule of construction, in deciding, that every cause which produces the same effect as the one mentioned in the act, comes within it." "It is not for the court to extend the law to all cases coming within the reason of it, so long as they are not within the letter." *Sacia vs. De Graaf*, 1 Cow. Rep. 356, 357.

A discharge under an insolvent law does not prevent the operation of the Statute of Limitations. *Scott vs. Stackhouse*, 1 Halst. Rep. 431.

In the case of *Vance vs. The Ex'ors. of Grainger*, (Cam. & Norw. Rep. 71,) THE COURT said; "The Act of Limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso; we cannot add to these, others, which the legislature has omitted; nor construe cases to be within the saving, which it is plain were not meant to be included."

By the proviso contained in the 8th section of the Act to settle disputes concerning the title to land in the county of Onondaga,

is entitled to any such action of trespass, detain, action sur

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(1 R. L. 215. sess. 20. ch. 51.) *Infants have three years after coming of age, within which to file their dissent to the award of the commissioners. Jackson ex dem. Boyd vs. Lewis, (In Error.) 17 Johns. Rep. 475. Same case, 13 Ibid. 504. (in Sup. Court).*

The presumption of payment of a bond, arising from length of time shall be suspended between 1st January, 1776, and 21st June, 1784, under the law passed 21st June, 1781. *Penrose & Al. Ex'ors. &c. vs. King, 1 Yeates' Rep. 344.*

Where a subsequent disability of the plaintiff to sue arises, the period of such disability is, in cases of presumption arising from lapse of time, (although it is otherwise under the Statute of Limitations,) to be deducted from the twenty years: [*after which payment of money secured by a specialty will be presumed.*] And, therefore, if after the cause of action accrued, he becomes an alien enemy, the whole time of the continuance of the war must be excluded from the calculation *Bailey vs. Jackson, 16 Johns. Rep. 210.*

But from the decision in the case of *Ogden, Adm'r. &c. vs. Blackledge, Ex'or. &c. (3 Cranch's Rep. 272. 279.)* it seems that the Statute of Limitations is suspended during war, as to alien enemies; for it was there *Held* that "the period when the Act of Limitations began to run against debts due by citizens of the United States to British creditors," was "from the final ratification of the treaty of peace between Great Britain and the United States." (Treaty of 1783.)—And in the case of *Wallads. Robson, (2 Nott & McC. Rep. 498. 510.)* it was expressly decided, that "A war suspends the operation of the Statute of Limitations, between the citizens of the two countries, for the time during which it continues." *BAY, J. in delivering the Opinion of the Court,* said; "From every view therefore which I have been able to take of this new and important subject, and from all the authorities which I have been able to examine, which have a bearing upon it, I am decidedly of opinion, that the declaration of war amounted to a suspension of the limitation act, against British creditors; and the whole of the time which elapsed from its declaration to the day when peace was proclaimed, ought to be thrown out of the computation of time mentioned in the statute for barring a plaintiff of a just demand."

And in the case of *Hopkirk vs. Bell, (3 Cranch's Rep. 454.)* where the plaintiffs had always resided in Great Britain, and had never been resident in Virginia, and the promissory note of the defendant upon which suit was brought, was dated 21st August,



there, ~~repelin~~, actions of accounts, actions of debts, actions of

1773, the Court *Held*, " That the said Act of Limitations [*of Virginia*] is not a bar to the plaintiff's demand on the said note ; " and this Court is of opinion, that the length of time from the " giving the note, to the commencement of the war in 1775, not " being sufficient to bar the demand on the said note, according to " the said act of assembly, [*whereby British creditors were prevented from suing with effect for their debts from April, 1774, until the year 1790*] the treaty of peace between Great Britain " and the United States of 1783, does not admit of adding the " time previous to the war, to any time subsequent to the treaty, " in order to make a bar." & *Vide same case*, 4 *Cranch's Rep.* 164.

And in the case of *Wilcox & Al. vs. Henry*, (1 *Dall. Rep.* 71.) *McKEAN*, Ch. J. in his *Charge to the Jury*, said ; " An alien enemy " has no right of action whatever during the war ; but by the law " of nations, confirmed by universal usage, at the end of the war, " all the rights and credits, which the subjects of either Power had " against the other are revived ; for, during the war, they are not " extinguished, but merely suspended."

If an Act of Limitations have a clause, " saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned or out of the Commonwealth, three years after their several disabilities removed," a creditor resident of another state, removes his disability by coming into the Commonwealth, even for temporary purposes ; provided the debtor be at that time within the Commonwealth. *Faw vs. Roberdeau's Executor*, 3 *Cranch's Rep.* 174.

The exception in the Maryland Statute of Limitations, in favour of "such accounts as concerns the trade or merchandize between merchant & merchant, their factors and servants, which " are non-residents within this province," applies to dealings between a merchant creditor residing out of Maryland, and a debtor residing in Maryland. And in order to take the case out of the exception, it is not sufficient to aver that the creditor returned to, came, and was within the state of Maryland after the cause of action accrued, and more than 3 years before bringing the suit. *Bond & Al. vs. Jay*, 4 *Cranch's Rep.* 350.

Foreigners, who have never been in the United States, are within the exception of the statute for the limitation of personal actions, [*Stat. 1786, c. 52.*] and may bring their action within the time limited by the statute after their coming within the United States. *Hall vs. Little*, 14 *Mass. Rep.* 203.

trespass for assault, menace, battery, wounding, or imprison-

A creditor in a foreign country, having an agent here, is not therefore within the Statute of Limitations. *Wilson vs. Appleton*, 17 Mass. Rep. 180.

In the case of the Estate of Martin Schaeffer, deceased, (9 Serg. & R. Rep. 266.) DUNCAN, J. delivering the Opinion of the Court, said; "Now the absent creditor, I mean absent beyond sea, is a privileged creditor. The Act of Limitations does not run against him, until he comes within the United States; if he is within the United States after the debt becomes payable, it then first runs, and continues to run, notwithstanding subsequent absence beyond sea. It would seem equally reasonable, that his interest should be as much protected by his absence as the principal." & Vide *Ward vs. Hallam*, 2 Ball. Rep. 217. Same case, 1 Yeates' Rep. 329.

The residence of a plaintiff within the state of New-York, at the time when the debt accrued, and since, does not bring him within the proviso of the Act of Limitations in favour of persons beyond seas. A party entitled to the benefit of the proviso, loses his privilege from the time he comes into the state. *Thurston & Al. vs. Fisher*, Adm'r. &c. 9 Serg. & R. Rep. 288.

If one be out of the state when the cause of action accrues to him, the Limitation does not begin to run until he comes into the state. *Graves vs. Graves' Executor*, 2 Bibb's Rep. 207. & Vide *Beauchamp*, Adm'r. &c. vs. *Mudd*, Ibid. 538.

In the case of *Oswald & Co. vs. Dickinson's Ex'x*. (2 Call's Rep. 21.) PENDLETON, President, who delivered the resolution of the Court, said; "Again, a factor dealing for a resident in Maryland, is equally within the mischief intended to be remedied [§6, 6 Stat. "Larg. 480.] by considering it as a dealing with the factor himself. Among others, one important effect is, to take the case out of the saving in the Act of Limitations, in favour of persons out of the country; which extended to the partner in Maryland as well as to those in Britain."

The saving in the Act of Limitations of North Carolina, "only extends to such persons as were beyond the sea at the time when the action accrued; not to such who were here when it accrues." *Cobham, Assignee, &c. vs. The Executors of Neill*, 2 Hayw. Rep. 5, 6.

In the case of *Milnet vs. Davis*, (Fall term, 1821, Mitt. Select Cas. 436.) The Court said; "The Replication only alleges the

ment, actions upon the case for words, be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, discovered, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment, should have done.

In an action of trover,<sup>(a)</sup> a question was, the defendant being beyond seas at the time the statute was made, and until *primo*

(a) Cro. Car. 333.

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“disability of one of the plaintiffs, and it is now well settled that “where several persons are entitled to an action, in order to avoid “the effect of the Statute of Limitations, the whole of them must “labour under the same disability.”

But in the case of *Jones vs. Henry & Al.* (Spring term, 1823, 3 *Litt. Rep.* 46.) The COURT OF APPEALS of Kentucky, in delivering their Opinion, said; “It is apparent however from “the language of the eighth section of the Statute of Limitations, “(2 Dig. L. K. 863,) that where all of several plaintiffs are without the Commonwealth, or labor under any other disability, at “the time their cause of action accrues, the disability must be removed as to each, before the statute will commence running.”

If plaintiff be in England at the time the cause of action accrues, the time of limitation begins to run, so that if he, (or if he die abroad) his executor or administrator, do not sue within six years, they are barred by the statute. *Smith, Ex'or. &c. vs. Hill, Ex'or. &c.* 1 *Wils. Rep.* 134.

Defendant had given a note of hand to plaintiff's intestate, who, for 17 months after the note became due, was of sound mind, but afterwards became *non compos*, and so continued till his death, and more than four years had elapsed. *Held*, that the intervening insanity of the holder of the note did not suspend the Statute of Limitations, which, having once begun to run, (at the time of action accrued) continued notwithstanding disabilities supervened. *Adams, Adm'r. &c. vs. Smith*, 2 *Rep. Court S. C.* 269.

*Caroli*, whether he were to be relieved by the equity of the statute, although not within the express words of this proviso? for that provides only where the \*plaintiff is [ \*176 ] over the sea, to have his action when he returns, if he brings his action within the year after his return; but there is no mention, when the defendant is over the seas, of enlarging the time. And it was strongly urged for the plaintiff, that he was within the equity of the said proviso: for it would be *inutilis et stultus labor* to sue one to outlawry, being beyond seas, when it is erroneous and reversable at his return.

Jones and Berkley, Js. were of that opinion, that the defendant being beyond seas, was within the equity and intention of the statute, as well as where the plaintiff is beyond seas.

Richardson, Ch. J. doubted thereof, and said he would not deliver any opinion.

But Croke, J. conceived, that the defendant being beyond seas, is not within the equity of the statute: for the statute provided remedy where the plaintiff is over seas, and omitting where the defendant, &c. did it purposely, and never intended to provide any remedy for him, because the plaintiff may prosecute his suit by original, although the defendant be beyond seas, to an outlawry, which will show there was not any remissness in him; which is the matter which the law intends, and that there should be a fresh prosecution; and when the defendant reverseth the outlawry, the plaintiff shall then know where he is to prosecute the suit against him; so the first original is not merely a fruitless and idle labour, but thereby preserves his action.

\*The same objection was raised in *Beven v. Clap-* [ \*177 ] *ham*; (a) but the court, in that case, held that it was within the reason and intent of the statute; but a different construction afterwards obtained.

The plaintiff brought an *indebitatus assumpsit* : (a) the defendant pleaded *non assumpsit infra sex annos* ; and the plaintiff replied, that the defendant was all that time beyond sea, so that he could not prosecute any writ against him, &c. And, upon a demurrer, it was argued, that the plaintiff was not barred by the statute which was made to prevent suits, by limiting personal actions to be brought within a certain time ; and it cannot be extended in favour of a defendant, who was a debtor and beyond sea, because it is uncertain whether he will return or not ; and therefore there is no occasion to begin a suit till his return. It is true, the plaintiff may file an original, and outlaw the defendant, and so seize his estate, but no man is compelled by law to do an act which is fruitless when it is done, and such this would be ; for if the plaintiff should file an original, it is probable the defendant may never return ; and then, if the debt were a thousand pounds, or upwards, he would be at a great expense to no purpose, or if the party should return, he may reverse it by error. It is a new way invented for the payment of debts ; for if the debtors go beyond sea, and stay there six years, their debts would by this means be all paid. The words of the statute do not extend to this case ; for the proviso is, " If the plaintiff be beyond sea when the cause of action doth accrue, that then he shall have liberty to continue it at his return ;" yet it is within the equity of law for him to bring his action when the

[ \*178 ] \*defendant returns, who cannot be sued till then.

That statutes have been expounded according to equity is not now a new position ; for constructions have been made according to the sense and meaning, and not according to the letter of many statutes ; as the statute of Westminster the 2d, c. 11. which gives an action of debt against a gaoler for an escape, and that *per breve* ; yet by the equity thereof, it has been adjudged, that a bill of debt will lie. For the statute of 1 Rich. II. c. 12. gives the like action against the warden of the fleet for the escape of a prisoner in execution ; which, by construction, has been adjudged to extend to all gaolers and sheriffs.

(a) 8 Mod. 313.

If this statute should not be expounded according to equity, then, if the plaintiff himself should be beyond sea six years after the cause of action, and die there, his executor or administrator cannot sue for a debt.

*Sed Curia.*—This case is out of the equity of the statute, which provides a remedy when the plaintiff is beyond sea; but not when the defendant is there. It was never intended to make any provision for him, since the plaintiff might file an original, and sue him to the outlawry. In *S. C. Carth. 137. S. C. 1 Show. 99.* it is said that judgment was given for the defendant.

But now, by the statute of 4 Anna, c. 16. s. 19. that “if any person or persons, against whom there shall be any such cause of suit or action for seaman’s wages, or any of the causes of action mentioned in the 21 Jac. I. shall be, at the time of any such cause of suit or action accrued, beyond the seas, then the person or persons entitled to any such suit or action shall be at liberty to \*bring the said actions, against [\*179] such person and persons, after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions by this act, and by the said other act of 21 Jac. I. c. 16.”[1]

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[1] Vide 1 R. L. New-York, 186, (sess. 24. c. 183. sect. 5. *Proviso.*)

Under the act of the 21st of *March*, 1783, suspending the Statute of Limitations during war, and the act of the 26th of *February*, 1788, saving the plaintiff’s right of action, where the *defendant is out of the state*; in an action on a promissory note, dated the 17th *December*, 1777, it was held, that the maker, being within the *British* lines during the war, and departing with the *British* at the close of the war, was to be deemed as *out of the state* during that time, and the cause of action as accruing on the 21st of *March*, 1783, the plaintiff having brought an action within six years after the return of the maker to the state, the latter could not avail himself of the Statute of Limitations. *Sleght, Adm’r. &c. vs. Kane, 1 Johns. Cas. 76.*

It is reported, in an anonymous case in Shower, vol. 1. p. 91. that Dublin, or any other place in Ireland, is beyond the sea

The *saving* in the Statute of Limitations extends to foreigners or those who have resided altogether out of the state, as well as to citizens of the state who may be absent for a time. *Ruggles vs. Keeler*, 3 Johns. Rep. 263. *Fowler vs. Hunt*, 10 Johns. Rep. 464. *Same point, Dwight, Adm'r. vs. Clark*, 7 Mass. Rep. 515. 518.

Where a debt is contracted abroad by a person residing out of the state, and the debtor afterwards comes within the state publicly, and so that the creditor, with ordinary diligence and due means, might arrest him, it is a *return* into this state within the meaning of the proviso in the 5th section of the Statute of Limitations, (Sess. 24. c. 183. 1 R. L. 186.) and, from the time of such return the statute begins to run against the plaintiff's demand. *Fowler vs. Hunt*, 10 Johns. Rep. 464.

A defendant who removes from one county to another in Virginia, is not thereby prevented from pleading the Act of Limitations, unless the plaintiff has been, by such removal, actually defeated or obstructed in bringing or maintaining his action. *Wilson vs. Koontz*, 7 Cranch's Rep. 202.—(& Vide *Ormsby vs. Letcher*, 3 Bibb's Rep. 271. *Sneed vs. Hall*, (In Error.) 2 Marsh. Rep. (Ky.) 22. where the same construction is given to the same provision of the Statute of Limitations of Kentucky, 9th section.)

If the defendant obstructs the plaintiff from bringing his action by absconding and concealing, he cannot avail himself of the Statute of Limitations. *Edwards vs. Davis*, 4 Bibb's Rep. 211.

A debtor's return into this government, from which the Statute of Limitations begins to run, must be such a return as will enable his creditor, using reasonable diligence, to arrest his body as security. *White, Administratrix, vs. Bailey*, 3 Mass. Rep. 271.

The exception in the Statute of Limitations, as to the absence of the debtor from the Commonwealth, "was intended as general, "and comprehending all persons who are without the Commonwealth and have not attachable property within it: so that the statute shall not begin to run, until the defendant is, either by "his person or property, subject to original process." *Dwight Adm'r. vs. Clark*, 7 Mass. Rep. 515. 518.

If the vendor be a transient person, and withdraws from the state, immediately after the sale, the vendee may bring his action

within this state; but, since the union with Scotland, the

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for rescission, after the return of the vendor, though more than the time of prescription has elapsed since the sale. *Morgan vs. Robinson*, 12 *Mart. Rep.* 76.

In the case of *Vans vs. Higginson*, (10 *Mass. Rep.* 29, 30.) which was an action upon a promissory note;—the parties at the time of making the note were in parts beyond sea: but the plaintiff was within the Commonwealth more than six years before the action was commenced, and after the cause of action accrued; the defendant was within the Commonwealth after the cause of action accrued, and more than six years before action brought; the defendant pleaded the Statute of Limitations; and the plaintiff replied, that at the time of making the promises the parties were in parts beyond sea; and that he, the plaintiff, was never afterwards within the United States at the same time that the defendant was also within the same, or had any property subject to attachment by the ordinary process of law, until within six years before the commencement of the action; Upon a general demurrer to the replication and joinder in demurrer, THE COURT, in giving judgment, said; “The object of the replication in this case is to “to make an exception, which the Statute of Limitations has not “made, and which we therefore cannot support. When the defendant came within the state, the six years began to run, as it “respected him; and when the plaintiff returned, the six years “began as to him. The replication is adjudged bad and insufficient.”

It must be shewn that the defendant was not a resident of the state, at the time the cause of action accrued, to enable the plaintiff to take advantage of the provision of the 7th section of the Act of Limitations [*New Jersey*.] *Halsey vs. Beach*, 1 *Penn. Rep.* 122.

If a debtor remove or return into this state [*Vermont*] publicly, and with a view to dwell and permanently reside within its jurisdiction, although in an extreme part from the place of his former residence, or that of his creditor, it is a coming or return within this state, within the meaning of the 10th section of the Statute of Limitations, although the creditor should have no knowledge of such return. So too, if a debtor, having no intention to reside, come or return into the state, and this is known to the creditor, and he has an opportunity to arrest the body of such debtor. But in the latter case, the debtor to avail himself of the statute, must prove the actual knowledge of his creditor of such temporary residence. *Maxxon & Al. vs. Foot*, 1 *Aik. Rep.* 282.



(though inaccurately) been used as synonymous terms. It has been questioned whether Scots bills of exchange are inland or foreign bills, and been determined by Ryder, Ch. J. at Guildhall, that they were foreign bills.

Dennison, J. (absente Lord Mansfield.) This is a new experiment, and in the case of a positive law. The statutes 21 Jac. I. c. 16. and 4 & 5 Anne, are both express, that the party to be excused must be beyond the seas. Here the plaintiff pleaded that he was in foreign parts, viz. in Scotland. What does he mean by foreign parts? He must be beyond the seas: that is the old and true expression. Before the union, England was an island of itself; since the union, Scotland has made part of it.

Foster, J. (absente Wilmot, J.) This is a very clear case. The statute of limitations ought to be construed literally. I think it a noble, beneficial act. *Interest reipublicæ, ut sit finis litium*. There is no such kingdom as England now: plaintiff, therefore, while in Scotland, was not out of this realm. Besides, that is not now the phrase. Legislature, by altering it to "beyond the seas," at such a critical juncture, seems to have pointed at this very case of dwelling in Scotland. It is a great question, and very doubtful, whether the statute of non-  
[ \*181 ] claim does not now extend to residents in Scotland. \*As at present advised, I should rather think it does. It is true, that since the union a writ of *ne exeat regno* has been issued from the court of chancery to prevent a man's going to Scotland: (Done's case, 1 P. W. 263. :) but the condition of the recognisance was a special case, not to go out of this realm, or to Scotland. Had these words been omitted, going to Scotland would not have forfeited the recognisance.

Judgment for the defendant.

In the saving clause, no actions on the case are mentioned, but actions on the case for words: therefore,

*assumpsit*, (a) by *Chandler*, an infant, by his guardian, against *Fitch*, the plaintiff declared upon two promises, that the defendant was indebted to him in 50*l.* and 12*l.* for moneys by the said defendant before that time had and received to the use of the plaintiff; and being so indebted, the defendant promised to pay those moneys, and had not paid them, wherefore he brought his action. The defendant pleaded in bar, *non assumpsit infra senectutem*; to which the plaintiff replied, that at the time of exhibiting the bill, he was, and still is, an infant within the age of twenty-one years; to which the defendant demurred in law. And it was objected, that this action was limited by the statute of limitations of 21 Jac. I. c. 16. and the privilege of infancy is not saved by the statute in this action; for in the restraining and limiting part of the statute, this action upon the case is limited to six years, \*and it is not excepted in [\*189] the saving clause of the act; wherefore, no actions on the case are saved and excepted by reason of infancy out of the body of the act, except only actions on the case for words. And all other actions on the case are limited within the body of the act, and are not saved and excepted in the case of infancy by the saving clause; and therefore the plaintiff should be barred.

*Sed non allocatur*; for, by the court, this action on the case is within the equity of the saving clause of the act, though it be not expressed; for the intention of the statute was not to preserve a trivial action on the case for slanderous words in respect of infancy, and not to save for the infant an action for a real duty, as in this case. Wherefore, it was adjudged for the plaintiff.

*Note.*—It was said, that the infant should have waited until his full age, because the six years were elapsed during his infancy, and therefore he could only pursue his action according to the words of the saving clause of the act, which is in six years after his full age; but this was not regarded by the court.

(a) 2 Saund. 117. g.

And it seemed to Saunders, that he may well pursue his action at any time within age, although the six years are elapsed. See, for this, the case of non-claim in fines, 2 Inst. 519. Cotton's case.

In an action on the case, (a) the plaintiff declared, that the defendant's testator being in his life-time, viz. such a day, indebted to the plaintiff in the sum of 20*l.* for so [\*183] \*much money before that time to his use had and received, did assume and promise to pay the same when he should be thereunto required; and that the testator did not in his life-time, nor the defendant since his death, pay the money, though he was thereunto required. The defendant pleaded, that the testator did not, at any time within six years, make such promise. The plaintiff replied, that he was an infant at the time of the promise made, and that he came not to full age till the year 1672; and that, within six years after he attained the age of twenty-one years, he brought this action; and so takes advantage of the proviso in the statute of limitations, 21 Jac. I. c. 16. that the plaintiff shall have six years after the disability by infancy, coverture, &c. is removed. The defendant demurred.

By Rigby, Serjeant: The reason of his demurrer was, because, in the said proviso, actions on the case on *assumpsit* are omitted. This act was made for quieting of estates and avoiding of suits, as appears by the preamble, and therefore shall be taken strictly. There is an enumeration of several actions in the proviso, and this is *casus omisus*, and so no benefit can be taken of the proviso. In a writ of error upon a judgment, brought 4 Car. I. in the court of Windsor, the judges held, that an action on the case for slandering a man's title is out of this act, because such an act was rare, and not brought without special damages. But Hyde, Ch. J. doubted. 1 Cro. 141. The law-makers could not omit this case unadvisedly, because it is

(a) 2 Mod. 71.

within those sorts of actions enumerated by this act. This promise was made to the plaintiff when he was but a day old, and it would \*be very hard now, after so [\*184] many years, to charge the executor.

But Turner, Serjeant, argued, that though an *indebitatus assumpsit* is not within the express words of the proviso, yet it is within the intent and meaning thereof; and so the rule is taken in Beufage's case *quando verba statuti sunt specialia, ratio autem generalis, statutum intelligendum est generaliter*. And this is a statute which gives a general remedy; and the mischief to the infant is as great in such actions of *indebitatus assumpsit* as other actions; and therefore, it is but reasonable to intend that the parliament, which hath saved their rights in debts, trovers, &c. intended likewise that they should not be barred in an *indebitatus assumpsit*. In the case of *Smith v. Colshill*, debt was brought upon a bond: the defendant there pleaded the statute of the 5 Edw. VI. c. 16. of the selling of offices, the words of which are, "that every bond to be given for money or profit, for any office, or deputation of any office, mentioned in the statute, shall be void against the maker." In that case, the bond was given to procure a grant of the office, and not to exercise the same. Now, though this was not within the express words of the statute, yet the bond was held void: and if it should be otherwise, the mischiefs which the statute intended to remedy would still continue; and therefore, the intent of law-makers in such cases is to be regarded: for which reason, if actions of *indebitatus assumpsit* are within the same mischief with other actions therein mentioned, such also ought to be construed to be within the same remedy. But he took the case of *Swaine v. Stephens* to rule this case at bar; in which case \*this very statute was pleaded to an action of [\*185] trover; and the plaintiff replied, that he was beyond sea: and upon a demurrer to the replication, the court held trover to be within the statute, it being named in the paragraph of limitation of personal actions, which directs it to be brought within the time therein limited; that is to say, all actions on the

case within six years; and then enumerates several other actions, amongst which trover is omitted: yet, the court were there of opinion that trover was implied in those general words.

And of that opinion was the Chief Justice, and Wyndham and Atkyns, Js. that, upon the whole frame of the act, it was strong against the defendant: for it would be very strange that the plaintiff in this case might bring an action of debt, and not an *indebitatus assumpsit*. When the scope of an act appears to be in a general sense, the law looks to the meaning, and is to be extended to particular cases within the same reason; and therefore they were of opinion, that actions of trespass, mentioned in the statute, are comprehensive of this action, because it is a trespass upon the case; and the words of the proviso save the infant's right in actions of trespass. And therefore, though there are no particular words in the enacting clause which relate to this action, yet this proviso restrains the severity of that clause, and restores the common law, and so is to be taken favourably; and this action being within the same reason with other actions therein mentioned, ought also to be within the same remedy.

But Ellis, J. doubted whether actions of trespass could comprehend actions on the case; and that, when the [186] \*parliament had enumerated actions of trespass, trover, case for words, &c. if they had intended this action, they would have named it. He said he was for restoring the common law as much as he could, but doubted much whether this proviso did help the plaintiff.

But judgment was given for the plaintiff.[1]

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[1] In an action of assumpsit by husband and wife, for services by the wife before and up to the time of her marriage, the defendant pleaded the Statute of Limitations; and plaintiffs replied the coverture of the wife; more than three years had expired after the marriage before the bringing of the suit--*Held*, that the Statute barred the action, for that the cause of action accrued to the wife

**Case(a) against an executor for 50l. received by the testatrix. The defendant pleaded the statute of limitations in bar: and**

(a) Nels. 74.

before marriage, and her subsequent coverture could not stop the running of the Statute. *Killian & wife vs. Watt*. 3 *Murph. Rep.* 167.

A bill was filed against executors calling upon them to account, after a lapse of thirty-five years. Motion to dismiss the bill, on the ground of lapse of time, refused; HALL, JUDGE, delivering the *Opinion of the Court*, said; "But we must keep it in view, that the "wife was the meritorious claimant; that she intermarried with "William Tate in her minority, and that after the death of her husband, (the first moment she became a free agent) she made herself a party to this suit; for this reason I think the suit ought not "to be dismissed, but made dependant upon facts hereafter to "be ascertained at the hearing." *Tate, Admr. &c. vs. Greenlees' Admsrs.* 2 *Hawks' Rep.* 486. 489.

In a bill for a specific execution, though some of the complainants may be infants when the cause of action accrues, while others are not, such circumstance does not prevent the running of the Statute of Limitations; all the complainants must labour under a disability, or the Statute will run against all. *Allen & Al. vs. Beal's heirs*, 3 *Marsh. Rep.* (Ky.) 555.

Where slaves were conveyed to certain trustees for the use of a wife for life, and after her death for the use of her husband for life, and after the death of the survivor then to the children of the marriage equally to be divided, &c. *Held*, that the children took not only the *equitable*, but the absolute *legal* estate, and that if the parents in their life time, be deprived of their slaves and depart this life leaving children under age, the act of Limitations does not run against the children until they attain the age of twenty-one years. *Baird vs. Bland & Al.* 3 *Munf. Rep.* 570.

Motion to dismiss a bill filed against an administrator for an account after a lapse of thirty-seven years, disallowed; because complainants were infants at the time of the intestate's death; some of them married during infancy, and were yet *femes covert*; and the defendant, moreover had induced them by his representations, to believe he would settle without suit. *Falls & Al. vs. Torrance*, 3 *Hawks' Rep.* 490.

A plea of the Act of Limitations is not a bar to an action on a testamentary bond of more than 12 years standing, where the per-

the plaintiff replied, she was under age at the time of the promise made: and that, within six years after she came of age, she filed an original against the defendant. The defendant rejoined, that the statute of limitations doth not give liberty to one who was an infant to bring an action on the case within six years after he is of age, &c. And upon demurrer and rejoinder, the plaintiff had judgment; and the judgment in this case was given for the reasons in *Chandler v. Flett*.

This question was again raised in *Rochschilt v. Leibman*,<sup>(a)</sup> where the plaintiff brought an action upon a bill of exchange, to which the defendant pleaded the statute of limitations, and the plaintiff replied himself beyond seas; to which the defendant demurred.

And Reeve objected, that no actions on the case are within the proviso, but actions on the case for words; and cited *Cro. Car.* 245. *Show.* 98.

(a) *Str.* 836.

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son bringing the action does not become of age until 17 years after the date of the bond, and 4 years before the institution of the suit. *Welch vs. The State, use of Smith, 5 Harr. & Johns. Rep.* 369.

When an infant is coupled in a judgment as defendant with others of full age, and *Error is brought by all*, after the expiration of a year from the judgment rendered, but within a year from the time the impediment of infancy is removed, the writ of error is not barred by the Statute of Limitations, but is within the purview of the saving clause. *Priest & Al. vs. Hamilton, 2 Tylers' Rep.* 44.

Wherever the Statute of Limitations is a bar to the recovery of one of the parties, it operates against the whole, because the disability of one does not save the rights of the others. The statute protects the rights of those who are incompetent to protect themselves; but where some of the parties are competent, they ought to take care of the interest of all by protecting a suit within time. *Riden & Al. vs. Frion, 3 Murph. Rep.* 577.

Parker, *contra*. Where the words of a statute are general, they are to be understood in that sense. 10 Co. 101.

\*It is impossible to think so trifling an action as for [\*187] words should be saved, and not those which are founded on a contract: besides, it has been determined that the proviso extends to this case.

*Et per Curiam*.—Judgment for the plaintiff.



*What restores the Remedy.*

THE statute does not extinguish the debt, but only bars the remedy :[1] it may therefore be revived by a subsequent promise on the part of the defendant ; though it was formerly holden, that a promise renewed within six years, if not upon a new consideration, would not bind.(a) But it has since been ruled, that a promise of payment within the six years, though the debt were contracted long before, would deprive the defendant of the benefit of the statute. And at the present day, a promise to pay a preceding debt, barred by the statute, is sufficient

(a) 2 Vent. 152.

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[1] It is settled, "That the Statute of Limitations does *not* destroy the debt:" it only take away the remedy. (*Per LORD MANSFIELD,*) *Quantock & Al. Assignees, vs. England*, 5 Burr. Rep. 2630. *Gustin vs. Brattle*, *Kirby's Rep.* 303.

The Statute of Limitations does not annihilate the debt, but suspends the remedy. *Lord & Al. Exors. &c. vs. Shaler*, 3 Cons. Rep. 131.

The Act of Limitations affects the *remedy*, and not the right. *Jones, Admr. vs. Hooks' Admr.* 2 Rand. Rep. 303. *Graves vs. Graves' Exor.* 2 Bibb's Rep. 207. *Commonwealth vs. McGowan*, 4 Bibb's Rep. 63.

"The Court are of Opinion, that the act of limitations does not "operate to extinguish the debt, but to bar the remedy." *Barney vs. Smith*, 4 Harr. & Johns. Rep. 495. (*Per CHASE, Ch. J. delivering the Opinion of the Court.*)

A war suspends the operation of the Statute of Limitations between the citizens of the two countries, for the time during which

to revive that debt, and no new consideration is necessary. (a) [2]

So, also, is a conditional promise, upon the condition being performed, [3] as, where the plaintiff, as executor, (b) brought an

(a) 25 How. 128. (b) 5 Mod. 428.

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it continues. *Wall ad. Robson*, 2 Nott & McC. Rep. 510. *Ogden, Admr. &c. vs. Blackledge, Exor. &c.* 2 Cranch. Rep. 272. *Hopkirk vs. Bell*, 3 Cranch's Rep. 454. *Same Case*, 4 Cranch. Rep. 164. *Wilcox & Al. vs. Henry*, 1 Dall. Rep. 71. *Higginson Survivor, &c. vs. Air & Al.*, 1 Equ. Rep. (Dessaux.) 427, 430.

[2] An acknowledgment does not revive the old debt, but is evidence only of a new promise, of which the former debt is the consideration. *Danforth vs. Culver*, 11 Johns. Rep. 146. *Jones & Al. Exors. &c. vs. Moore, Admr. &c.* 5 Binn. Rep. 573. *Gustin vs. Brattle, Kirb. Rep.* 303, 304. *Pittman vs. Foster and Norris & Uz.* 1 Barnew. & Cress. Rep. 248.

A new assumpsit for a store account barred by the six months Act of Limitations [of Virginia, 1779—c.10. Stat. Larg. 381.] binds the debtor. *Beall vs. Edmonson*, 3 Calls' Rep. 514.

A promissory note does not work a novation of the debt. But it prevents the effect of the prescription of one year. *Turpin vs. His Creditors*, 9 Mart. Rep. 562.

"The Statute of Limitations is a bar, on the supposition, after a certain time, that a debt has been paid, and the vouchers lost. "Wherever it appears by the acknowledgment of the party that "it is not paid, that takes the case out of the Statute." *Clark, Admr. &c. vs. Hougham*, 2 Barnew. & Cress. Rep. 149. (Per BAYLEY, J.)

A bond barred by the Statute of Limitations, and upon which no payment has been made within sixteen years, is not a sufficient consideration to support an action upon an express promise to pay it. *Ludlow, Assignee, &c. vs. Van Camp*. 2 Halst. Rep. 113.

[3] Vide *Heylin vs. Hastings*, 12 Mod. Rep. 223.

Where the defendant promised to pay, in certain specific articles, a debt barred by the Statute of Limitations, it was held that the promise was conditional, and that the plaintiff was bound to.

action of *assumpsit* for goods sold by the testator to the defen-

shew that he offered, and was ready to accept, the specific articles.  
*Bush vs. Barnard*, 8 *Jacks. Rep.* 407.

In the case of *Wetzell vs. Bussard*, (11 *Wheat. Rep.* 309. 314.) MARSHALL, Ch. J. in delivering the Opinion of the Court, said; "We think upon the principles expressed by the Court in the case in 8 *Cranch's Rep.* [*Clementson vs. Williams*, page 72.] that an acknowledgment which will revive the original cause of action, must be *unqualified and unconditional*, it must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or, if it be conditional, it may amount to a new *assumpsit* for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition or a readiness to perform it, must be shewn. In the case at bar, the defendant said to one witness, that if the plaintiff had come forward and settled certain claims the defendant had against him, he would have given him his powder; and to another he said, 'he should be ready to deliver the powder whenever the plaintiff settled a suit which Doctor Ewell had brought against defendant in the Court of Alexandria, on account of a patent right and machine sold to him by the plaintiff.'—These declarations do not amount to an *unqualified and unconditional* acknowledgment that the original debt was justly demandable. They assert a counter claim on the part of the defendant, which he was determined to oppose to that of the plaintiff. He did not mean to give validity to the plaintiff's claim, but on condition that his own should be satisfied. These declarations, therefore, cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. It may be considered as a new promise, for which the old debt is a sufficient consideration, and the plaintiff ought to prove a performance, or a readiness to perform, the condition on which the promise was made." & vide, *Bell vs. Morrison & Al.* (1 *Peter's Rep. Sup. Ct. U. S.* 251, 362.) where the case of *Wetzell vs. Bussard*, is cited and the doctrine there settled, declared by STORR, J. in delivering the Opinion of the Court, to be, "The only exposition of the Statute, which is consistent with its true object and import."

The words, "if A. will say I have had the timber, I will pay for it," or, "prove it by A. and I will pay for it," will not take a case out of the Statute of Limitations, unless the condition be complied with. *Robbins vs. Otis*, 1 *Picker. Rep.* 368. *Same Case*, 3 *Picker. Rep.* 4.

dant, the defendant pleaded the statute of limitations; and in evidence it appeared, that the goods were sold six years before the action was brought; but that the defendant said to the plaintiff, when he demanded the money, "Prove it, and I will pay you:" for that was a new promise, and should charge the defendant notwithstanding the statute of limitations; for it \*was as much as to say, if the goods were sold [ \*169 ] to the defendant, he promised to pay for them.

In the case of a promise by the defendant(a) to pay a preceding debt when he should be able, it is incumbent on the plaintiff to show that the defendant was of ability to pay at the time of action brought.[1]

(a) 3 Esp. 159.

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Where the maker of a promissory note denied his signature, declaring the note to be a forgery; but said that if it could be proved that he signed the note, he would pay it; and it was proved at the trial that he did sign it; this was held sufficient to take the case out of the Statute of Limitations. *Seaward vs. Lord*, 1 Greenl. Rep. 163.

The defendant was sued upon a note of hand and pleaded the Statute of Limitations. It was proved that he made the note, and that the same had been presented to him within six years, when he said, "That he did not recollect giving the note, but if he did, "he would pay it, its being outlawed should make no odds:" this was held sufficient to take the case out of the statute. *Stanton vs. Stanton*, 1 New Hamp. Rep. (R. & W.) 425.

[1] Where to a demand of a debt of above six years standing, the party says, "I think I am bound in honour to pay the money, "and shall do it when I am able," it was Held, "That it was a conditional promise only; and that the plaintiff was bound to show, "that the defendant was then of sufficient ability to pay." *Davies vs. Smith*, 4 Esp. Rep. 36.

In assumpsit brought to recover a sum of money, the defendant pleaded the Statute of Limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant within six years; "I cannot pay the debt at present, but I will pay it as soon as I can." Held, that this was

But a promise to pay an executor cannot be given in evidence upon the issue of *assumpsit infra sex annos* to the executor's testator.[2]

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not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. *Tanner vs. Smart*, 6 *Barnew. & Cress. Rep.* 603.

To a plea of the Statute of Limitations the plaintiff replied a promise within six years, and proved that three years after the original cause of action accrued, and within six years of the commencement of the action, the defendant being called on for payment of the plaintiff's demand, said, "It was not in his power to pay, but as soon as it was, he would." *Held*, that the plaintiff must also prove the defendant's ability to pay. *Scales vs. Jacob*, 3 *Bingh. Rep.* 638.

In an action on an attorney's bill to which the defendant pleaded the Statute of Limitations, the plaintiff proved that the defendant having been applied to for payment, within six years before the commencement of the suit, said, "He should be happy to pay the debt if he could," and added, that if the plaintiff could recover for him, a debt due to him from one *Gurney*, the plaintiff might thereby satisfy his own debt; *Held*, that the plaintiff must shew the defendant's ability to pay. *Ayton vs. Bolts*, 4 *Bingh. Rep.* 105. (*Easter Term*, 1827.)

But in the case of *Thompson vs. Osborne*, (2 *Starkie's Rep.* 98.) it was held by Lord ELLENBOROUGH, *at nisi prius*, (in 1817,) that, a promise by a defendant to pay a debt by instalments when he is able, is sufficient to take a case out of the Statute of Limitations without proof of time being given, or of the ability of the party.

[2] An acknowledgment of a subsisting debt made within six years before action brought, to the executors of the creditor, will not where the issue is upon the Statute of Limitations, support a declaration upon a promise to the testator himself. There should be a special Count. *Jones & Al. Exors. &c. vs. Moore, Admr. &c.* 3 *Binn. Rep.* 573. *Short vs. McCarthy*, 3 *Barnew. & Ald. Rep.* 631. (*Per BAYLEY, J.*) & *vide May's Exor. vs. Cowman's Exor.* 3 *Har. & McHen. Rep.* 152, 153.

CONTRA, *Baxter, Admr. vs. Penniman*, 8 *Mass. Rep.* 133.

A statement by a debtor made to an executor, that the Testator had always promised never to distress the defendant for a debt, is not evidence to prove a promise to pay, made to the testator within six years; the Court said, "When the courts determine that an

*Assumpsit*(a) was brought by an executor upon a promise to his testator, to which the defendant pleaded the statute of limitations; and, upon evidence, it appeared, that after the death of the testator, and after six years elapsed from the time of the contract, the defendant owned the debt to the executor, and promised to pay it. But it was held that the action could not be maintained, the promise being made to the executor, and so

(a) *Ld. Raym.* 1101.

“acknowledgment is evidence of a new promise then made, it must be of a promise made by a person competent to make it, and to a person who is in existence to receive it. We have gone far enough.”—*Ward & Ux. vs. Hunter*, 6 *Taunt. Rep.* 210.

On the trial of an issue on the *assumpsit* of the testator within five years, an *assumpsit* of his *Executor* cannot be given in evidence, to prevent the operation of the Act of Limitations. *Fisher's Exor. vs. Duncan & Al.* 1 *Hen. & Munf. Rep.* 563. *Quarles' Admr. vs. Littlepage & Co.* 2 *Hen. & Munf. Rep.* 406. & vide *Saltar vs. Admr. of Saltar*, 1 *Halst. Rep.* 405.

An action was brought against *Foster* and *Norris & wife*, upon a joint promissory note made by *Foster* and *Norris' wife* before her marriage, and the promise was laid by *Foster*, and *Norris' wife* before her marriage, and defendants pleaded the Statute of Limitations, whereupon issue was joined: Held, that an acknowledgment of the note by *Foster* within six years, but after the intermarriage of *Norris* and wife, was not evidence to support the issue. *Pittam vs. Foster, and Norris & wife*, 1 *Barnew. & Cress. Rep.* 248. & vide *Atkins' Exors. &c. vs. Tredgold & Al. Exors. &c.* 2 *Barnew. & Cress. Rep.* 23. *Tanner vs. Smart*, 6 *Barnew. & Cress. Rep.* 603.

Where a declaration in *assumpsit* against an administratrix contained sundry counts, on promises made by the defendant's intestate, and a count, stating that the defendant administratrix aforesaid, after the death of the intestate accounted with the plaintiff, &c. and upon that accounting the intestate, was found indebted to the plaintiff in, &c. and that defendant, in consideration thereof, promised the plaintiff to pay him, &c. Held, that as it is not stated that the defendant promised as administratrix to pay, her declarations of her willingness to pay the claim if it was found to be correct, could not disprove her plea of the Act of Limitations. *Chapman vs. Dixon's Administratrix*, 4 *Harr. & Johns. Rep.* 527.

out of the issue. But it would have been otherwise, had the promise been made to the testator within six years.

And in a recent case, in the court of king's bench,<sup>(a)</sup> where in *assumpsit* was brought upon the money counts, in all of which the promises were laid to be made to the intestate; to which the general issue and the statute of limitations were pleaded. And at the trial, before Lord Ellenborough, Ch. J. at the sittings after Michaelmas term, in the 43d Geo. III. at Guildhall, the only evidence given was, of an acknowledgment by the defendant since the death of the intestate, and within six [ \*190 ] years, of an old \*existing debt, due to the intestate more than six years before; a verdict was taken for the plaintiff, with leave to the defendant to move to set it aside, and enter a nonsuit; which was accordingly moved for by Gibbs, who observed, that though an implied promise to pay might be raised from the acknowledgement of the debt, yet it must be raised to a person living at the time when the acknowledgement was made, and could not refer back, by relation, to a period before the intestate's death; and if not, then the evidence could not apply to any of the counts of the declaration.

Lord Ellenborough, Ch. J. when cause was to have been shown, said, that the case of *Green v. Crane*, 2 Ld. Raym. 1101. was decisive in support of the objection, and that a nonsuit must be entered.

Park, for the plaintiff, admitted that that case was in point against him, if the court thought it had been properly ruled.

The rule was made absolute to enter a nonsuit.

(a) 3 East, 409.

**Acknowledgment of a debt within six years,[1] though**

[1] In the case of *Barney vs. Smith*, (4 Harr. & Johns. Rep. 495.) CHASE, Ch. J. delivering the Opinion of the Court, said; "The act of Limitations is predicated on the principle, that from length of time a presumption is created that the debt has been paid, and that the debtor is deprived of his proof by the death of his witnesses or the loss of receipts. It is the design of the Act of Limitations to protect and shield debtors in such a situation; and consistent with this principle, and this view, the decisions have been made, that the acknowledgment or admission of the debtor will take the case out of the Act of Limitations, because if the money is still due and owing, the defendant has not suffered from lapse of time, nor has any inconvenience resulted to him therefrom."—And in the same case, page 496, JOHNSTON, J. said, "The act of Limitations was never intended to prevent the recovery of debts really due, but to protect persons from old claims when the evidence of their discharge, from length of time was supposed to have been lost." "The admission of the debt removes all doubts as to its having been discharged, and the offer to come to a settlement or reference, impliedly admits the party to be in possession of the evidence and documents necessary for such adjustments."

An inventory and affidavit of a debt made by an insolvent before a commissioner, in order to obtain his discharge (which is granted) under the insolvent act, is a sufficient acknowledgment to take the debt out of the Statute of Limitations. *Bryar v. Willcocks*, 3 Com. Rep. 159. 164.—Savage, Ch. J. delivering the Opinion of the Court, said, "It is certainly an admission that the note was due and unpaid, and that will authorize us to presume a promise, unless the acknowledgment is accompanied with expressions which negative that idea. (*Sands v. Gelston*, 15 Johns. 311.)" & vide *Bailey, Admr. &c. vs. Bailey*, 14 Serg. & R. Rep. 195. *Hudson vs. Cary*, 11 Serg. & R. Rep. 10.

An acknowledgment of the debt, when it is not accompanied with a protestation against paying it, is evidence sufficient for the Jury to presume a new promise. *Martin vs. Williams, Exor. &c.* 17 Johns. Rep. 331. *Johnson, Admr. &c. vs. Beardalee & Al* 15 Johns. Rep. 4. *Dean vs. Pitts*, 10 Johns. Rep. 36. *Price vs. Boisselet*, 9 Serg. & R. Rep. 131.

If the defendant on being arrested by the Sheriff, promises to settle with the plaintiff if he will give time for payment, it is a sufficient acknowledgment to prevent the operation of the Statute of Limitations. *Suby vs. Champlin*, 4 Johns. Rep. 461.



not a promise, yet it is evidence of a promise;(s) and

(a) 5 Mod. 428.

An acknowledgment by the defendant, within six years, that the plaintiff's demand was "justly due, and ought to be paid," is sufficient to take it out of the Statute of Limitations. *Baxter, Admr. vs. Penniman*, 8 Mass. Rep. 133.

The stating of an account, by the defendant, admitting the debt to be due to the plaintiff, was held to be a sufficient acknowledgment of the debt to take it out of the Statute of Limitations. *Smith, Admr. &c. vs. Ludlows*, 6 Johns. Rep. 267.

The case of *Dean vs. Pitts*, (10 Johns. Rep. 35,) was an action of *assumpsit* brought on two promissory notes made by the defendant and one *Richmond*, dated 5th November, 1793; the defendant pleaded *non assumpsit* and the Statute of Limitations. On the trial at the *Rensselaer* Circuit in 1811, it was proved that two years before, the defendant was shewn the notes and called upon for payment. The defendant admitted that he made the notes, and that they were given for an honest debt, but said they had been paid; that he had sent the money to *Richmond*, and supposed *Richmond* had paid the plaintiff; but if *Richmond* had not paid the notes, the defendant said he would pay them; that he would not plead the Statute of Limitations unless the money had been paid; and he thought he could make that appear. The jury found for the plaintiff and on a motion to set aside the verdict, the Court said, "The defendant admits the debt, and does not pretend he has paid it, but supposed his partner *Richmond* had paid it, and he takes upon himself the burden of proving it, for he said 'he thought he could make that appear.' This was sufficient to take the case out of the statute, and to cast upon the defendant the necessity of proving payment; and though the Court might have been induced to have looked with a very indulgent eye upon the proof of the payment which might have been produced, yet here none was attempted to be produced." The motion was denied.

The defendants in a deed between them and a third person, acknowledged, within six years, the existence of a debt due to the plaintiffs, who, however were wholly strangers to the deed. Held, that this was sufficient to take the case out of the Statute of Limitations. *Mountstephen & Al. vs. Brooke & Al. & Barnew. & Al.* Rep. 141.

A recital in a deed, of the existence of the plaintiff's cause of

it is settled, that the slightest acknowledgment will be

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action is good evidence to take a case out of the Statute of Limitations. *King vs. Riddle*, 7 *Cranch's Rep.* 168. *Mountstephen & Al. vs. Brooke & Al.* 3 *Barnew. & Ald. Rep.* 141. & *vide Clark, Admr. &c. vs. Hougham*, 2 *Barnew. & Cross. Rep.* 149.

An acknowledgment does not revive the old debt; but is evidence only of a new promise, of which the former debt is the consideration. *Danforth vs. Culver*, 11 *Johns. Rep.* 146. & *vide Roosevelt vs. Marks*, 6 *Johns. Ch. Rep.* 290. *Wetzell vs. Bussard*, 11 *Wheat. Rep.* 315. *Bell vs. Morrison & Al.* 1 *Peter's Rep. (Sup. Ct. U. S.)* 374. *Jones & Al. Exors. &c. vs. Moore, Admr. &c.* 5 *Binn. Rep.* 573. *Gustin vs. Brattle*, *Kirb. Rep.* 303, 304.

In an action of assumpsit brought more than six years after the debt accrued, it is not necessary to aver a new promise within the six years; but proof of an acknowledgment of the debt within the six years, is sufficient to repel a defence set up under the Statute of Limitations. So where the defendant offers to set off a demand against the plaintiff, which accrued more than six years before the bringing of the suit, it is not necessary that the defendant, in the notice annexed to his plea, should state a promise to pay within the six years; nor is it any objection that the demand offered to be set off was not originally due to the defendant, but had been assigned to him, the assignment being before the commencement of the suit. *Martin vs. Williams, Exor. &c.* 17 *Johns. Rep.* 330.

Where the defendants, in their answer accompanying the plea, admitted that they had not been called upon to pay to the complainants, their demand, during six years prior to the suit; and that to avoid litigation, they had, through their counsel, offered to pay to the complainants, their demand without interest; but at the same time, insisted that they were discharged, by length of time, from all liability, and expressly reserving their right to avail themselves of the Statute of Limitations, in case the offer was refused: *Held*, that this was such an acknowledgment and admission of the debt, as defeated the operation of the Statute. *Murrays vs. Coster & Al. (In Error.)* 20 *Johns. Rep.* 576. & *Vide Murrays vs. Coster & Al. (In Error.)* 4 *Cowan's Rep.* 617.

An acknowledgment of a debt barred by the Statute of Limitations as a subsisting debt, takes the case out of the Statute. This principle is applicable to the Statute [of Connecticut,] limiting the recovery of book-debts, notwithstanding the phraseology of the Statute. *Lord & Al. Exors. &c. vs. Shaler*, 3 *Conn. Rep.* 139.

sufficient to create such a promise, (a)[2] as, "I am ready

(a) Cowp. 548.

The rule that mutual accounts are not within the Statute of Limitations, and that the jury are to determine whether there is sufficient evidence of an acknowledgment to take the case out of the Statute, is equally applicable to accounts set off by the defendants, as to those on which the plaintiff brings his action. *Smith vs. Ruecastle*, 2 Halst. Rep. 357.

In the case of *The Administrators of Colkings vs. the Surviving Partner of Thackston & Co.* (Cam. & Norw. Rep. 93. 95.) the COURT said; "The plaintiffs and the defendants having agreed to refer the matters in dispute between them to arbitrators, takes the case out of the Statute of Limitations, and the present suit having been brought within three years after the reference had been entered into and made a rule of court, the present plaintiffs are entitled to recover in this suit."

"It is most unquestionably established that an acknowledgment of the debt, an offer to come to a settlement, or to refer to arbitrators, will take the claim out of the Act of Limitations. *Barney vs. Smith*, (On appeal.) 4 Harr. & Johns. Rep. 496. (per JOHNSON, J.)

But it the case *Chapman vs. Dixon*, (4 Harr. & Johns. Rep. 527. 531.) DORSEY, J. who delivered the Opinion of the Court, said; "I do not mean to decide the question how far an agreement between the plaintiff and defendant, to refer the matter in dispute to arbitration, would operate to take a case out of the Act of Limitations."

Upon a promissory note being presented to the maker he said, "It was at the desire of my mother I gave it; I will not pay it; Rosser ought to pay it; I will speak to him about it." Held, a sufficient acknowledgment to prevent the operation of the Statute. *Cobham, assignee, &c. vs. Mosely*, 2 Hayw. Rep. 6.

In an action of detinue for certain slaves, it was Held, that the plaintiff might adduce evidence of parol acknowledgments, by the defendant, or by the person under whom the defendant claims, that the property belonged to the plaintiff; for the purpose of rebutting an alleged adverse possession. *Smith & Ux. vs. Towne's Admr.* 4 Munf. Rep. 191.

[2] But now by an act of the British parliament, entitled an act "for rendering a written memorandum necessary to the va-

to account, but nothing is due to you." And, (a) though

(a) Burr. 1099.

"Validity of certain promises and engagements," passed 9th May, 1828, and which took effect from the 1st of January, 1829, the whole doctrine of the English Courts as to the effect of *parol* acknowledgments, in reviving a demand barred by the Statute of Limitations, is overturned; and the various decisions of those Courts, upon that subject, are no longer authority, in Great Britain. (Vide an abstract of this act, at the end of note [1] page 191.)

In an action of *assumpsit* against an administratrix, she pleaded the act of Limitations; and to avoid the bar, the plaintiff proved, that immediately preceding the institution of the suit, he presented his account to the defendant, who said she did not wish to see it; that she would pay all just claims against the estate of the deceased, as soon as she obtained money, and that she would put the money into the hands of the Orphan's Court, to have the same adjusted, and that if the plaintiff would pass his account with the Orphan's Court she would pay it. *Held*, that these declarations of the administratrix were sufficient to prevent the operation of the Act of Limitations; notwithstanding the plaintiff had not complied with the condition of the promise, by procuring his account to be passed by the Orphan's Court. By announcing her determination to pay all just claims, she waived all benefit of the Statute, and her subsequent promise to pay the account, if the Orphan's Court would pass it, demonstrated her willingness to pay the claim, if it was found to be correct. *Chapman vs. Dizon's administratrix*, 4 Har. & Johns. Rep. 527.

In the case of *Mosher, Exor. &c. vs. Hubbard*. (13 Johns. Rep. 510, 512.) which was an action to recover the amount of an order that had been drawn by the defendant, but which the drawee had refused to pay, the defendant pleaded the Statute of Limitations; a verdict was found for the plaintiff, and on a motion for a new trial, the Supreme Court said; (after discussing some other questions raised on the argument,) "The plaintiff is, therefore, entitled to recover, unless barred by the Statute of Limitations; and, in the opinion of the Court, the evidence is sufficient to take the case out of the Statute. In the conversation stated to have taken place between the defendant and *Brown*, it was not intimated by the defendant that he intended to avail himself of the Statute, but the only question in his mind seemed to be, Whether the order had not been paid; and he promised to examine his papers, and if he found he had paid the order, he was to write to the witness; but, as the witness testified, he never

the acknowledgment be made after the action brought, it has been held sufficient.[3]

"has written. This was sufficient to raise an implied promise to pay the money, unless, on examination, it should be found that the order had been paid, and there is no evidence whatever of any payment. The motion for a new trial must, accordingly, be denied."

In the case of *Holmes & Drake vs. D'Camp*, (1 Johns. Rep. 36.) SPENCER, J. delivering the opinion of the Court, said; "The stating of an account is regarded as a consideration for the promise; and it is in the nature of a new promise." & Vide *Smith, Admr. &c. vs. Ludlows*, 6 Johns. Rep. 287. *The President, &c. of the Union Bank vs. Knapp*, 3 Picker. Rep. 110.

In the case of *Johnson, Admr. &c. vs. Beardlee*, (15 Johns. Rep. 4.) The Court said, "Whether the new promise revives the old debt, or can be enforced as a new promise, upon a valid consideration, is immaterial to be discussed here. On a review of all the cases, (*Danforth v. Culver*, 11 Johns. Rep. 146.) we were of opinion, that the acknowledgment of the execution of the notes, with an express declaration that the party meant to avail himself of the Statute of Limitations, was not evidence of a new promise to pay; but we did not intimate, that an acknowledgment of the debt would not have been sufficient, unaccompanied with a protestation against paying it; indeed, there is a current of authorities, that an acknowledgment of the debt, is evidence sufficient for the jury to presume a new promise."

To take a demand out of the Statute of Limitations, direct and positive proof of an acknowledgment or new promise in any set form of words, is not required; but they may be inferred from facts without any words. A general acknowledgment of being indebted to the plaintiff is sufficient *prima facie*, to take the demand in suit out of the Statute; and the *onus* lies on the defendant to prove that he had reference to a different demand. An acknowledgment made to a stranger, in the absence of the plaintiff, will take a demand out of the Statute *Whitney vs. Bigelow*, 4 Picker Rep. 110.

[3] The acknowledgment, or promise to pay, though made after the commencement of the suit, is sufficient to take the case out of the Statute of Limitations. *Danforth vs. Culver*, 11 Johns. Rep. 146.

\*It was ruled at *Nisi Prius*, in the case of *Clarke* [\*191] v. *Bradshaw and Coghlan*, (c) that an acknowledgment

(a) 3 Esp. 157.

To a plea of set-off, the plaintiff replied the Statute of Limitations; the defendant supported his plea by proof of an acknowledgment from the plaintiff within five years, and a promise that it should go in discharge of the interest due to the plaintiff; but the witness could not prove the amount of the account, nor the items acknowledged; *Held*, that this acknowledgment takes out of the Statute of Limitations, so much as defendant can shew the plaintiff owed him not exceeding the interest. *Gray vs. Lowridge*, 2 *Bibb's Rep.* 284.

A general acknowledgment of a subsisting indebtedness, without specifying the amount of the debt or balance due, is sufficient to take a case out of the Statute of Limitations. *Lord & Al. Ex'ors. &c. vs. Harvey, Ex'or. &c.* 3 *Conn. Rep.* 370.

Suit was brought on a promissory note dated in 1776, payable on demand; the plaintiff proved that in 1791, he made a demand of the money, when the defendant admitted that he had had it, but said that *White* [the plaintiff] as paymaster of the regiment to which defendant belonged, had received his pay, and retained it to the amount of the note. *Per Curiam*, "This is a sufficient acknowledgment to take the case out of the Statute of Limitations." *White vs. Potter*, 1 *Case's Rep.* 159.

The defendant when the writ was served upon him, said, "I will write to Mr. Watts to attend to the business; Moodie did not do the business accurately." *Held*, this was such an acknowledgment as took the case out of the Statute of Limitations. *Miles vs. Moodie*, 3 *Serg. & R. Rep.* 211.

An acknowledgment of a debt, though accompanied by an allegation that it was barred by the Statute of Limitations, which the defendant "desired to be understood as pleading," was *Held* sufficient to take it out of the Statute. *Cadmus vs. Duman*, 1 *Case's Rep.* 176. & *Vide Sheppard & Al. vs. Murdock's Executor*, 3 *Murph. Rep.* 221.

If the defendant acknowledge the principal debt, but dispute the interest, it takes the debt out of the Statute of Limitations. *Henswood vs. Cheeseman*, 3 *Serg. & R. Rep.* 500.

But only as to the principal; not the interest. *Collyer vs. Willcock & Al. Ex'ors.* 4 *Bingh. Rep.* 315.

by the defendant to the clerk of the plaintiff's attorney, on

The defendant's intestate wrote a letter to one of the plaintiff's administrators, stating that he had received a copy of the plaintiff's intestate's account against him, and also that he had made out from his own books, his own account against him, but had lost them; and requested another copy of the account to be made out and sent to him; and that as soon as he received his books which he expected soon, he would have his own account made out again; and concluded by saying, "I will write to you again some time hence, and inform you when I will again return to the city, to put a close to this affair in the best manner I can." *Held*, that the jury ought to be directed that it was sufficient to authorize them to presume a new promise within six years, unless they were satisfied that it had no reference to the affairs on which the suit was founded. *Patton's Admrs. vs. Ash & Al. Survivors, &c. & Admrs. &c.* 7 Serg. & R. Rep. 116.

In the case of *Ferguson vs. Fitt*, (1 Hayw. Rep. 239.) which was an action on the case for wages due the plaintiff as master of a vessel, he relied to take the case out of the Statute of Limitations, upon letters written to him by the defendant within three years, stating "he would rather come to a settlement, although he should allow the amount insisted on by the plaintiff, than wait the event of a law suit," and the Court said, "As to the act of Limitations, the words used in these letters will take the case out of it."

A demand was made upon the defendant for payment of the amount of some certificates, which he had received of the plaintiff soon after the war; he answered, "I have credited him in my account with the value of the certificates, if he will meet me at Newbern I will settle with him." *Held*, sufficient acknowledgment to avoid the Statute of Limitations. *Toomer vs. Long*, 2 Hayw. Rep. 18.

In an action on a bond, it was proved that within 15 or 16 years the defendant had said, that "the bond was given for lands he had in his possession, but that the obligee had not made him a title, and he would not pay." *Held*, sufficient acknowledgment to repel the presumption of payment arising from lapse of time. *Sheppard, Ex'ors. vs. Cook's Ex'ors.* 2 Hayw. Rep. 241.

In the case of *Gustin vs. Brattle*, (Kirb. Rep. 399.) the Statute of Limitations of Connecticut was pleaded in bar, which enacts—"That no suit shall be maintained on any bond, but within seventeen years after an action on the same shall accrue."

the subject of the arrest, that the plaintiff had paid mo-

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*Held*, that an acknowledgment of the debt does not revive the action, and thereby save a bond out of the Statute. (*September Term*, 1787.)

But in the case of *Gates vs. Brattle, Admr. of Brattle*, (*In Error*, 1 *Root's Rep.* 187.) where the plaintiff *In Error*, had together with one *Gustin* executed a bond to the intestate, which became due more than twenty-six years before suit brought; but *Gustin* had within twenty-two years paid the interest on the bond, and, also endorsed on the bond a statement of the amount at that time due thereon; and the plaintiff within thirteen years thereafter, viz. on the 12th April, 1776, went from Boston over sea to Halifax, and there resided until the 20th of October following, when he died, and there was no administration taken on his estate, or any person capable of bringing a suit on said bond, until the 9th October, 1784, when the plaintiff took administration on the intestate's estate, and brought said suit within four years thereafter; it was *held*, that the plaintiff was entitled to recover notwithstanding the plea of the Statute of Limitations. (*March Term*, 1790.)

The Act of 1792 [*of Virginia, Rev. Code, Vol. 1. p. 167. Sect. 56.*] which makes it the duty of the Court "in an action upon an open account against an executor or administrator, to cause to be expunged from such account all items appearing to have been due five years before the death of the testator or intestate," applies to open accounts existing before the 1st day of October, 1793, when it took effect. (*See Rev. Code, Vol. 1. p. 293. c. 150.*) But it relates only to open accounts, and does not extend to settlements or assumptions; therefore, the plaintiff, to take his case out of the Act, may give in evidence an *assumpsit* of the testator or intestate, within five years, to pay a stated balance. *Brooke's Admrs. vs. Shelly*, 4 *Hen. & Munf. Rep.* 266.

A person borrowed a sum of money in the year 1807. In the year 1815, he stated, by parol, to the attorney of the party entitled to it, that he had made provision by his will, and had directed his executors to pay it at his death. He died in the year 1825, without having made any such provision. *Held*, in an action against the executor, that the promise was good, and the money recoverable; that neither the Statute of Frauds, nor the Statute of Limitations applied to the case; and that a moral obligation to pay was a sufficient consideration for the promise. *Wells vs. Horton*, *Exor. &c. 2 Carr. & P. Rep.* 383.

A. by means of a misrepresentation, received of B. and several other persons, his, (A.'s) tenants, various sums of money, to which



ney for him twelve or thirteen years before, but that he had

he was not entitled. B. applied to him to have the money which he had so paid returned, saying that he and the other tenants had been induced to pay more than was due. A. replied, that if there were any mistake it should be rectified: *Held*, that this obviated the Statute of Limitations as to payments made by the other tenants as well as by B.—Plaintiff, as Administratrix of one of the other tenants, after the death of her intestate, made one such wrongful payment as before mentioned out of the assets: *Held*, that she might recover it in her representative character. *Clark, Adm. &c. vs. Hougham*, 2 *Barnew. & Cress. Rep.* 149.

If a party, when he is arrested, say, "I shall go to my attorney's and pay the debt, and settle it," such statement is sufficient to take the case out of the Statute of Limitations. *Triggs, Adm. vs. Neunham*, 1 *Carr. & P.'s Rep.* 681.

In an action on a promissory note, the defendant having pleaded the Statute of Limitations, the plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the defendant to the plaintiff: "Business calls me to *Liverpool*. Should I be fortunate in my adventures, you may depend upon seeing me in *Bristol*; otherwise, I must arrange matters with you as circumstances will permit." The defendant did not show that there were any other matters besides the promissory note to which the letter could refer: *Held*, that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, and was a sufficient acknowledgment to take the case out of the Statute. *Frost vs. Bengough*, 1 *Bingh. Rep.* 266. *See vide, Tanner vs. Smart*, 6 *Barnew. & Cress. Rep.* 663. (Cited, *post*, page 191. n. [1].)

In the case of *College vs. Horn*. (3 *Bingh. Rep.* 119.) the following letter from the defendant to plaintiff's attorney was given in evidence by the plaintiff in answer to a plea of the Statute of Limitations:—"I have received your's respecting Mr. *Thomas Colledge's* demand; it is not a just one. I am ready to settle the account whenever Mr. *T. C.* thinks proper to meet on the business. I am not in his debt 90*l.* nor any thing like that sum: shall be happy to settle the difference, by his meeting me in *London*, or at my house." *Held*, that the judge was justified in directing the jury, "that after this letter the Statute of Limitations was out of the question."

Plea of the Statute of Limitations to a bill of discovery, overruled; upon letters from the defendant to the plaintiff, assigning reasons for declining to pay, and recommending the plaintiff to

since became a bankrupt, by which he was discharged, as well

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bring an action; which were considered as amounting to an acknowledgment of the debt sufficient to take the case out of the Statute, upon the *authorities*, though *against principle*. *Baillie vs. Sibbald*, 15 *Ves. Rep.* 185.

The case of *Douthwaite vs. Tibbut*, (5 *Maule & Sel.* 75.) was an action of assumpsit, to which the Statute of Limitations was pleaded. The plaintiff served as mate on a voyage to and from *Russia* in 1800, and the demand was for wages for that service, which took place during the *Russian* embargo. The witness who proved the making a demand of payment on the defendant, proved also that the defendant answered to such demand, "*I will not pay; there are none paid, and I do not mean to pay unless obliged*, you may go and try." This was held sufficient to take the case out of the Statute of Limitations. *Sed Vide Tanner vs. Smart*, 6 *Barnew. & Cress. Rep.* 603. (*Cited, post, page 191. n. [1.]—*)

In assumpsit against the defendant as acceptor of a bill of Exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then because it was out of date, and that he could not pay it, it was not in his power to pay it, was held sufficient to take the case out of the Statute, upon a plea of *Actio non accrevit infra sex annos*. *Leaper vs. Tatton*, 16 *East Rep.* 420. *Sed vide Tanner vs. Smart*, 6 *Barnew. & Cress. Rep.* 603. *CONTRA, (cited, post, page 191. n. [1.]—)*

In the case of *Peters vs. Brown* (4 *Esp. Rep.* [Ni. Pri.] 46,) the plaintiff to prove an acknowledgment of the debt by the defendant, within six years, called a witness, to whom the defendant was also indebted, and who having called on him for money, the defendant said,—"I suppose you want money; but I can't pay you; "I must pay Mr. *Peters* (the plaintiff) first, and then I'll pay you." *Held*, a sufficient acknowledgment, to take the case out of the statute, notwithstanding it was not made to the party himself.

If a defendant admits a debt which would otherwise be barred by the Statute of Limitations, but claims to be discharged by a written instrument, but which being referred to, does not amount to a legal discharge, he shall be bound by the admission, and the case be thereby taken out of the Statute of Limitations. *Partington vs. Butcher*, 6 *Esp. Rep.* 66.

In assumpsit for work and labour, the Act of Limitations was pleaded. *Held* that evidence of an acknowledgment by the de-

as by law, from the length of time since the debt had accrued.

defendant that the Plaintiff had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town he would have the business settled, was sufficient to defeat the operation of the Act of Limitations. *Fee vs. Conway's Adm'r.* 2 Har. & Johns. Rep. 307.

In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years, is admissible evidence to take the case out of the Statute of Limitations. *Gregory vs. Parker*, 1 Camp. Ni. Pri. Rep. 394.

In an action against A., on the joint and several promissory note of himself and B., it is enough, to give in evidence, to take the case out of the Statute of Limitations, a letter written by A. to B., within the six years, desiring him to settle the plaintiff's money. *Halliday vs. Ward*, 3 Campb. Ni. Pri. Rep. 32.

These words, "After payment of all my just debts, then I give," &c. Held sufficient to take a debt out of the Statute of Limitations. *Anonymous*, 1 Hayw. Rep. 243.

In the case of *Lansdale's Ex'x. vs. Ghequiere*, (On Appeal 4 Har. & Johns. Rep. 257, 259,) the will mentioned in the complainant's bill, began, "When all my just debts and funeral expenses are paid, I devise and bequeath as follow," &c. and then proceeded to dispose of the testator's estate. The bill which was against the Executrix, and heirs, and representatives of T. Lansdale, and some others, alleged that W. M. Lansdale was the agent of the Executrix in settling the estate of the testator, and that he, W. M. L., frequently and fully, within two years before the filing of the bill, admitted the claim, and promised adjustment and settlement, and gave an order on B. and C. for a part of it. Some of the defendants appeared and answered the bill. They did not deny or confess the allegations in the bill, but professed ignorance, and left the complainants to establish their case by proof. The answer of W. M. Lansdale, which by consent was also to be taken as the answer of the Executrix and of P. Lansdale, [another of the representatives of the testator,] concluded thus: "He therefore relies on length of time as a bar to any relief which the complainants might otherwise have had, and claims the benefit thereof at the trial." Against three of the defendants who did not appear, the bill was taken *pro confesso*. The allegations of the bill were fully supported by the proof taken under the commission in the cause. One witness proved that W. M. Lansdale, as the agent of his mother, [the Executrix,] fre-

It was contended, that this evidence was not sufficient to charge the defendant; that it was against the sense and spirit of the statute that it should be so; that the plea of the statute of limitations itself admitted the existence of the debt, but claimed a discharge by reason of the statute; and that it would be depriving the party of the protection of the statute, if the claim of that protection should be construed into an admission of the debt, and be sufficient to charge him.

Lord Kenyon said, he was not now to put a construction on the statute of limitations for the first time. It had been decided,

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quently promised the witness as the complainant's counsel, to settle the claim, and that the only difficulty was to ascertain the balance due. KILTY, CHANCELLOR, in pronouncing his decree, said; "As to the plea of Limitations or the insisting on it in the answer, it is to be observed, that at law the least acknowledgment takes the demand out of the Statute or Act, and by a parity of reasoning there seems to be a sufficient acknowledgment in the answer to have that effect. The trust created by the will is also relied on. Notwithstanding the reversal of the decree in the case of *Blakeway vs. The Earl of Stafford*, 2 P. Wms. 273, the Chancellor is of opinion that the doctrine recognized in *Precedents in Chancery*, and other authorities, as to the trust created by a charge on the estate for payment of debts, and there being thereby taken out of the Statute of Limitations, is not overruled or changed. That such charge may be made without express words, as in the case of *King vs. King & Ennis*, 3 P. Wms. 358, in which the devise was 'that after the testator's debts paid, the rest and residue of his real and personal estate should go to his son;' and that although the cases generally speak of charges on the real estate, a devise of the personal estate, either express or implied, would have the same effect; and would not be merely void, as suggested in the note in the case of *Jones vs. Strafford*, 3 P. Wms. 89, but would form rather a stronger ground." This cause was carried by the defendant to the COURT OF APPEALS; but the decree of the Chancellor in favour of the complainants, was there affirmed. *Sed Vide* the cases of *Smith vs. Porter & Al. Exors.*, 1 Binney's Rep. 209. *Roosevelt vs. Marks*, 6 Johns. Ch. Rep. 266. 295, 296. *Campbell's Executors vs. Sullivan*, Hardin's Rep. 17. *Dewdney ex parte* & *Seaman ex parte*, 15 Ves. Rep. 488, 497. *Roffe ex parte*, 19 Ves. Rep. 470. *Walker's Exors. vs. Campbell's Exor. &c. & Al.* 1 Hawk's Rep. 304. *Brown's Admr. vs. Griffith*, 6 Munf. Rep. 450. *Burke vs. Jones*, 2 Ves. & Beame's Rep. 275. 280. CONTRA. (These cases are all cited in note [1,] page 191.)

that an acknowledgment of the debt was sufficient to take the case out of the statute; and he was bound to hold it so.

And this has been confirmed by a subsequent decision of the court of king's bench, that an acknowledgment of the debt, though it be accompanied with a declaration by the defendant that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted the debt, is sufficient to take the case out of the statute of limitations.[1]

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[1] But where in an action on a promissory note, the defendant pleaded the Statute of Limitations, and the plaintiff proved that within a year of the trial and after the commencement of the suit, the defendant on being shewn the note, admitted that he had executed the note, but said it was outlawed, and that he meant to avail himself of the Statute of Limitations; this was held not to be sufficient evidence of a promise to pay within six years. *Danforth vs. Culver*, 11 *Johns. Rep.* 146. *Same Point, Stanton vs. Stanton*, 1 *New Hamp. Rep. (R. & W.)* 425.

CONTRA, *Cadmus vs. Bumon*, 1 *Coxe's Rep.* 176.

Where the acknowledgment is accompanied with circumstances or declarations showing an intention to insist on the benefit of the Statute, no promise to pay can be implied. *Bangs vs. Hall*, 2 *Picker. Rep.* 368. *Guier vs. Pearce*, 2 *Browne's Rep.* 35.

In the case of *Lawrence vs. Hopkins*, (13 *Johns. Rep.* 288.) the defendant declared that he was not holden to pay any thing, and that the contract could not be enforced at law, and upon being informed that one of his friends had offered the plaintiff a sum of money (which had been refused,) for a compromise, said, "that he was sorry any such offer had been made, as he never would pay one cent on the note as he considered it an unjust debt." The Court said, "The evidence is not sufficient to take the case out of the Statute of Limitations. It neither shows an express or implied promise to pay the debt; but, on the contrary, it appears that the defendant uniformly considered the demand as unjust from the beginning, and that he was under no obligation to pay it. To infer a promise to pay, in direct opposition to the defendant's denial of the justice and fairness of the debt, would be trifling with the Statute. The proposition to give 25 dollars to settle the demand must be laid out of the case, because that was a mere peace offering, and being rejected, it cannot prejudice the defendant."

\*In an action of *assumpsit* (a) for wheat sold and delivered, the defendant pleaded the general issue, and [ \*192 ]

(a) 4 East, 599.

A letter from the defendant to the plaintiff in which he denies that he was ever liable to the plaintiff's demand, but states that another person is responsible, by whom he takes it for granted payment has not been made, and of whom he offers to furnish the plaintiff with evidence to recover, will not avoid the Act of Limitations. *Brown vs. Campbell*, 1 Serg. & R. Rep. 176.

Where the defendant admits that he has received the money, which the plaintiff claims, but denies the validity of the claim, such acknowledgment is not evidence of a new promise so as to take a case out of the Statute of Limitations. *Sands vs. Gelston*, 15 Johns. Rep. 511. *Marshall vs. Dalliber*, 5 Conn. Rep. 486.

To take a case out of the Statute of Limitations, an express acknowledgment of the debt, as a debt due at that time, or an express promise to pay it, must be proved to have been made within the time prescribed by the Statute. *Bell vs. Rowland's Admrs.* *Hardin's Rep.* 301. & vide *Ferguson & Ux. vs. Taylor*, 1 Hayw. Rep.

Where the defendant says, that if the plaintiff has a claim either at law or equity, he will compromise the business, or submit it to arbitration, but, at the same time, denies that he has any claim either at law or equity; this is not sufficient to take the case out of the Statute. *Sands vs. Gelston*, 15 Johns. Rep. In this case (page 520.) SPENCER, J. in delivering the Opinion of the Court, said, "I am bound by authority to consider the acknowledgment of the existence of a debt within six years before the suit was brought, as evidence of a promise to pay the debt. But I insist, that if, at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, then it will not be evidence of a promise sufficient to revive the debt, and take it out of the Statute. In consonance with this distinction, I take it, the case of *Danforth vs. Culver*, (14 Johns. Rep. 146.) and *Lawrence v. Hopkins*, (13 Johns. Rep. 288.) were decided in this court." & Vide *Roosevelt vs. Mark*, 6 Johns. Ch. Rep. 290, *Same Point*.

An offer by a defendant to compromise a suit, which is rejected, cannot be made use of to take the case out of the Statute of Limitations. *Lawrence vs. Hopkins*, 13 Johns. Rep. 288. & Vide *Murray vs. Caster & Al. (In Error.)* 4 Cowen's Rep. 635. (per GOLDEN, Senator.)

the statute of limitations. And at the trial, the plaintiff proved

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An acknowledgment to take a case out of the Statute of Limitations must be such a one as is consistent with a promise to pay. *Guier vs. Pearce*, 2 *Browne's Rep.* 35. *Read vs. Wilkinson*, *Ibid.* (Appendix 15.) *Scull and others, Administrators, &c. vs. Wallace's Executors*, 15 *Serg. & R. Rep.* 231.

The Statute of Limitations is a good plea in bar, in a Court of Equity as well as at law; unless there "be something special in the case, or some new equity to form an exception to this general rule;" and where to a suit at law, the defendant had pleaded the Statute, and the plaintiff filed a bill of discovery, with a view to enable him to show a promise within six years, it was *Held*, that the defendant was not bound to discover any thing that would destroy the effect of his plea at law. *Lansing vs. Starr*, 2 *Johns. Ch. Rep.* 150, 151. & *Vide Kanes vs. Bloodgood & Al.* 7 *Johns. Ch. Rep.* 90.

In the case of *Tichenor vs. Colfax*, (1 *South. Rep.* 155,) KIRKPATRICK, Ch. J. who delivered the Opinion of the Court, said; "The pleading of the Statute of Limitations never calls in question the justness of the debt originally; it only raises the presumption that the same has been satisfied or paid; and to this presumption the Statute gives effect, by taking away the party's remedy to recover. For the defendant, therefore, to say that the debt was just, but that he had paid it, was no admission of, or assumption to pay an existing debt, but the contrary; and notwithstanding such acknowledgment, he might well put himself upon the Statute to protect him from further vexation."

An acknowledgment of the original justice of the claim is not sufficient to take the case out of the Statute of Limitations; "the acknowledgment must go to the fact that it is still due." *Clementson vs. Williams*, 8 *Cranch. Rep.* 72, 74. *Wetzell vs. Bussard*, 11 *Wheat. Rep.* 314, 315. *Thompson vs. Peter & Al. Adms. &c.* 12 *Wheat. Rep.* 567. *Bell vs. Morrison & Al.* 1 *Peter's Rep. (Sup. Ct. U. S.)* 351, 362. *Same Point, Bangs vs. Hall*, 2 *Picker. Rep.* 368. *Baxter, Admr. &c. vs. Penniman*, 8 *Mass. Rep.* 133. *Lord & Al. Ex'ors. &c. vs. Shaler*, 3 *Conn. Rep.* 133. *Marshall vs. Dalliber*, 5 *Conn. Rep.* 480, 486. *Tichenor vs. Colfax*, 1 *South. Rep.* 153, 155. *Jones vs. Moore*, 5 *Binn. Rep.* 576. *Cowan vs. Magauran*, *Wallace's Rep.* 66. *Harrison vs. Handly*, 1 *Bibb's Rep.* 443, 445. *Ormsby vs. Letcher*, 3 *Bibb's Rep.* 271. *Bell vs. Rowland's Adms. Hard. Rep.* 301. *Roosevelt vs. Marks*, 6 *Johns. Rep.* 290.

that the defendant, on being arrested, said, "I do not consider

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And the like rule holds as to acknowledgments to repel the presumption of payment arising from lapse of time in cases not within the Statute. *Boyd, Ex'or. &c. vs. Grant & Al. Ex'ors. &c.* 13 *Serg. & R. Rep.* 124.

A mere indorsement made on a note by the plaintiff himself, without the knowledge of the defendant, or proof of payment of the sum indorsed, will not take the demand out of the Statute of Limitations. *Whitney vs. Bigelow*, 4 *Picker. Rep.* 110.

Where the maker of a promissory note delivered goods to the holder to be sold, and the proceeds appropriated towards the payment of the note, and a sale of some of the goods was not effected until nearly six years after; it was *Held*; that if the proceeds were endorsed upon the note within a reasonable time, it would be considered, in reference to the Statute of Limitations, as a payment made by the maker's order. But if the holder without any assent on the part of the maker or any notice to him, make the sale and indorsement after a reasonable time has elapsed, this will not take the note out of the Statute. *Porter vs. Blood*, 5 *Picker. Rep.* 54.

In the case of *Fuller vs. Hancock*, (1 *Roof's Rep.* 238, 241.) the COURT said, that "endorsement upon a bond doth not "save it out of the Statute of Limitation."

The 3d section of the Act of 8 Geo. IV. passed 9th May, 1828, "for rendering a written memorandum necessary to the validity of certain promises and engagements," enacts, that, no indorsement or memorandum of any payment written or made upon any promissory note, Bill of Exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the Act of Limitations.

An agreement of a debtor that a settlement made by the creditor and a third person, should be examined by either party, will not take a case out of the Statute of Limitations. *Ormsby vs. Letcher*, 3 *Bibb's Rep.* 270.

A vote passed at a Town Meeting appointing a committee to "settle the dispute" between the town and the plaintiff, was held not to take the plaintiff's demand out of the Statute of Limitations. *Fiske vs. The Inhabitants of Needham*, 11 *Mass. Rep.* 452.



myself as owing the plaintiff a farthing, it being more than six

A debt which is barred by the Act of Limitations, is not revived by a clause in a will ordering the testator's just debts to be paid. *Smith vs. Porter & Al. Ex'ors. &c.* 1 *Binney's Rep.* 209. *Roosevelt vs. Marks*, 6 *Johns. Ch. Rep.* 286.

CONTRA, *Anonymous Case*, 1 *Hayw. Rep.* 243.

Creating a trust upon a personal estate by will, for the payment of debts, will not revive a debt barred by the Statute of Limitations. *Campbell's Ex'ors. vs. Sullivan*, *Hard. Rep.* 17. & *Vide Dewdney ex parte, Seaman ex parte*, 15 *Ves. Rep.* 488, 497. *Roffey ex parte*, 19 *Ves. Rep.* 470.

A debt barred by the Statute of Limitations is not revived by a direction in the debtor's will, that certain property be sold, "and with the proceeds thereof, *after paying my debts*, that they redeem," &c. *Walker's Ex'ors. vs. Campbell, Ex'ors. &c. & Al.* 1 *Hawks. Rep.* 304.

A trust created by will for the payment of debts, by a general direction that all the testator's debts shall be paid, extends only to such as he was bound in conscience to pay: therefore an undertaking which is merely *nudum pactum* is not comprehended and may be barred by the Act of Limitations. *Chandler's Executrix vs. Hill & Al. Ex'ors. &c.* 2 *Hen. & Munf. Rep.* 124.

A provision in a will, that the money arising from the sale of the testator's personal property, *after payment of his just debts*, shall be applied to certain purposes, does not create a Trust for the payment of the debts, nor take any debt out of the operation of the Act of Limitations. *Brown's Admr. vs. Griffeth*, 6 *Munf. Rep.* 450.

In the case of *Burke vs. Jones* (2 *Ves. & Beame's Rep.* 275. 280.) THE VICE CHANCELLOR (Sir Thomas Plumer,) decided, that a devise in trust for payment of debts does not revive a debt upon which the Statute of Limitations had taken effect by the expiration of the time before the testator's death. And in commenting upon the argument urged, viz. that a contrary rule existed in equity, he said: "No case has been cited, within the period of half a century in which such a rule is stated as existing except for the purpose of complaining of it. It was justly observed, that those complaints are a recognition of the rule by very high authorities; and there is certainly considerable authority for concluding, that such a rule has been understood as prevailing; that a devise of real estate for the payment of debts would let in debts barred

years since I contracted. I have had the wheat, I acknowledge,

“by the Statute of Limitations. It must, however, be remembered, that the last time it appears in print, in the case of *Oughterloney v. Earl Powis*, (Amb. 231.) LORD HARDWICKE did not consider it so established, that it should be acted upon without consideration; expressing surprise, how such a rule could be established. It has received the decided disapprobation of Lord Kenyon, and Lord Alvanley; and it is impossible to read the judgment in *Ex parte Denny*, (15 Ves. 477. See p. 497.) without perceiving the Lord CHANCELLOR’s disapprobation of such rule. To the floating notion, which certainly has prevailed for a great length of time, countenanced by high authorities, that there is such a rule, must be opposed those authorities I have mentioned; to which may be added the declaration of a Judge very conversant with the law and practice of this court, that there is no such rule as to debts positively barred; distinguishing the case, where the time having commenced, the death occurs before it has run out; and then the trust would keep it alive. I have paused upon this case, not from any doubt of the principle, but that I might have an opportunity of communicating with Lord Redesdale, and collecting all the information that could be obtained upon a question of such magnitude, involving a general rule of great importance, upon a subject that must very frequently occur; that it may be settled and publicly known, if this clause is to have the effect that has been supposed; or, if not, that such a notion as to its operation may no longer remain afloat. With this view, I have given the question all possible attention; I have spared no pains in collecting every case in print, or that I could hear of, bearing upon it; I have traced the history of this supposed rule to its foundation; and have examined to the bottom, the authorities on which it has been supported, many in number, and some not very correctly reported, which I have compared with the *Register’s* Book. I shall go through those authorities. The result is, that, though there are many *dicta*, there is not one case, the facts of which are distinctly stated; deciding, that a debt, actually barred by the statute, is revived merely by virtue of this clause, either as to personal, or real estate, and as to the former it has not been argued. In almost all the cases there was a recognition of the very debt, either express, or by fair inference; or the death occurred before the statute had actually attached; and then according to Lord Redesdale’s opinion, a trust being created for creditors, the statute cannot attach; and the lapse of time forms no bar.”

In the case of *Roosevelt vs. Mark*, (6 Johns. Ch. Rep. 266. 296, 296.) KENT, Ch. cited with approbation the opinion of the VICE CHANCELLOR in *Burke vs. Jones*; and said; “This decision ap-

and I have paid some part of it, and 26l. remains due." On the

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"pears to me well founded upon principle, and upon the construction of the authorities, and to put an end to this litigious question." And he decided, that, a devise of real and personal estate, for the payment of just debts, does not revive a debt barred by the Statute of Limitations.

A testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of 1500*l.* sterling towards his debts; directed sundry tracts of Land to be sold, and the moneys arising therefrom, as well as from loan office certificates, or otherwise, (after payment of his just debts,) to be equally divided among his six sons. On a bill brought by one of the creditors of the testator, the Statute of Limitations being pleaded, and the complainant not having shewn that he came within any of the exceptions of the act; it was held that the Statute ought not to operate to prevent a recovery of so much of the *specific fund* as remained undisposed of, but that it would be a bar to a recovery out of the *general fund*. *Lewis' Executor vs. Bacon's Legatee, &c.* 3 *Hen. & Munf. Rep.* 89.

The case of *Swan vs. Sowell*, (2 *Barnew. & Ald. Rep.* 759.) was an action of assumpsit on a promissory note; Plea, 1st, the general issue; 2dly, the Statute of Limitations; but there was no plea or notice of set-off. It was proved that on the plaintiff's shewing the defendant the note within six years, the latter said, "you owe me more money: I have a set-off against it." Held, that, that was not a sufficient acknowledgment within six years to take the case out of the Statute of Limitations. HOLROYD, J. said; "How can it be contended, that an assertion by a defendant that 'he has a good defence, is an acknowledgment of the debt?'"

Where a party revives a debt barred by the Statute of Limitations, by paying it into Court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest. *Collyer vs. Willcock & Al. Exors.* 4 *Bingh. Rep.* 315.

Defendant being arrested on a note, said that he owed the plaintiff the money and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken these steps, he (defendant) would keep him out of it as long as he could. Held, that this was not such an acknowledgment as would take the case out of the Statute of Limitations. *Fries vs. Boisselet*, 9 *Serg. & R. Rep.* 128.

After suit brought on a promissory note, the defendant admitted

part of the defendant it was objected, that these expressions

he had given such a note but said he had paid it, *Held*, that this was not such an acknowledgment of a subsisting debt as will avoid the plea of the Statute of Limitations. *Smith vs. Freel, Addis. Rep.* 291.

Though a slight acknowledgment of the debt will take a case out of the Statute of Limitations, yet if the debtor qualify his acknowledgment in such a manner as to shew that it was his intention not to pay, the Statute will take effect. Therefore where a debtor on being called on for payment of a promissory note more than six years after it became due, said, *that as there had been no money transactions between himself and the plaintiff previous to or during the year 1812, he was surprised at the demand; that he owed him nothing on the account mentioned*, and referred him to his final discharge under the Act of 13th March, 1812, it was *Held*, that the debt was barred by the Act of Limitations, notwithstanding the Act of 1812 was unconstitutional and void. *Hudson vs. Carey*, 11 *Serg. & R. Rep.* 10. & *Vide Bailey, Admz. &c. vs. Bailey*, 14 *Serg. & R. Rep.* 195. *Eckert vs. Wilson*, 12 *Serg. & R. Rep.* 393.

A testator being indebted to one of his children, devised to her fifty pounds, to be paid at the expiration of ten years after his decease, and proceeded thus; "It is my further mind and will, that if any of my said children shall, after my decease, make any demand against my Executors, for any services they may have done or performed for me, in my life time, then instead of the bequest mentioned to be given to such child or children, so exhibiting any such demand or charge, I give the sum of fifteen shillings apiece, and no more." In an action against the Executor, by a child, for services rendered to the Testator, to which the Statute of Limitations was pleaded, the Court *Held*, that the above clauses in the Will did not prevent the Statute of Limitations from running. *Cresman & Ux. vs. Caster, Exor. &c. 2 Browne's Rep.* 123.

*Lance* and *Parker* having unsettled accounts, *Parker* gave *Lance* a stipulation in these words; "If, in the settlement of accounts between Mr. *Lambert Lance* and myself, any balance should appear to be due him, I hereby assume payment thereof, so as to prevent its being barred by the operation of the Limitation Act." Upon suit brought against *Parker*, he pleaded *non assumpsit infra quatuor annos*; and issue being taken upon the replication thereto, it was *Held*, that this stipulation bound only for four years from its date, and that the Statute might after that period be pleaded by the party who gave it. *Executors of Lance vs. Parker*, 1 *Rep. Const. Ct. So. Car.* 168.

amounted to no more than what he had stated upon record in

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An account on its face is barred by the Statute of Limitations; but the plaintiff enters a credit of recent date, which the defendant disavows: such entry, without some further proof, will not take the case out of the Statute. *Executors of Taylor vs. McDonald*, 2 Rep. Const. Ct. So. Car. 178.

A person had given a note against which the Statute of Limitations had run, and upon the note being presented to him for payment seized it, saying, "I am glad I have got my hands on it. I have paid it long ago." This is not such an acknowledgment as will take a case out of the Statute. *Executors of Gray vs. Kernahan*, 2 Rep. Const. Ct. So. Car. 65.

In the case of *Coltman vs. Marsh*, (3 Taunt. Rep. 380,) the defendant pleaded the Statute of Limitations; the evidence given at the trial was, that the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since;" *Held*, that this was not to be left to the jury as evidence of a sufficient acknowledgment to take a debt out of the Statute of Limitations. & *Vide Hellings vs. Shaw*, 7 Taunt. Rep. 608.

A party, on being asked for the payment of his Attorney's bill, admitted that there had been such a bill; but stated that it had been paid to the deceased partner of the attorney, who had retained the amount out of a floating balance in his hands. *Quære*, whether in order to take the case out of the Statute of Limitations, evidence is admissible to shew that the bill had never in fact been paid in this manner. *Semble*, that such evidence is admissible, if at all, only where the defendant states the debt to be discharged by particular means, to which he refers with precision, and where he has designated the time and mode so strictly, that it is impossible it could be discharged in any other manner than that specified. *Beale, Survivor, &c. vs. Nind*, 4 Barnew. & Ald. Rep. 566.

Where the defendant in an action on a promissory note to which the defence was the Statute of Limitations, had said that such note had been paid, by the services of his wife in the dwelling house of the plaintiff; and the plaintiff proved, that payment had not so been made; it was *Held*, that this did not amount to an acknowledgment of the debt sufficient to take it out of the Statute. *BRISTOL, J. in delivering the Opinion of the Court*, said, "A debt being barred by the Statute of Limitations, the defendant is entitled to take advantage of it, unless he consents to relinquish its protection, either expressly, or by evident implication. The truth or falsehood of the defendant's declaration as to paying the demand, appears to me immaterial to the true point of in-

his plea, which confessed the existence of the debt, but avoided the action, by alleging the lapse of time.

"quity, which in all such cases, should be, whether the defendant has, by an express or implied recognition of the debt, voluntarily renounced the protection of the Statute. We think this should depend on the defendant himself, and on his own declarations: not on disproving the truth of these declarations and thereby converting what was intended as an absolute denial of any indebtedness into an acknowledgment of such debt, and a promise to pay it. It might as well be claimed, if a defendant denied the execution of a note barred by the Statute of Limitations, and the plaintiff could prove that he executed it, that the defendant had forfeited the protection of the Statute. No intention to waive the protection of the Statute can be inferred from the declarations of payment made by the defendant, even if those declarations are proved untrue." *Marshall vs. Dalliher*, 5 Conn. Rep. 488. & Vide to the same effect, *Bailey, Admz. &c. vs. Bailey*, 14 Serg. & R. Rep. 195.

*Sed Vide, White vs. Potter*, 1 Coxe's Rep. 159. CONTRA.

Assumpsit for goods sold and delivered, and on the money counts. Pleas, general issue, and the Statute of Limitations. Defendants paid money into Court generally; *Held.* that such payment did not take the case out of the Statute. The Court said; "The payment into court was equivalent to saying so much is due and no more. You cannot from such a negative imply an affirmative. The plaintiff, therefore, with respect to the rest of his demand, was in precisely the same situation as if that sum had not been paid in. *Long vs. Grenville*, 3 Barnew. & Cress. Rep. 10. & Vide *Shaddick, Admz. &c. vs. Bennett*, 4 *Ibid.* 769.

In the case of *A'Court vs. Cross*, (3 Bingh. Rep. 329.) the defendant being arrested on a debt more than six years old, said, "I know that I owe the money; but the bill that I gave is on a three penny receipt stamp, and I will never pay it." *Held.* that this was not such an acknowledgment of the debt, as would take the case out of the Statute of Limitations. BEST, Ch. J. in delivering the Opinion of the Court, said; "I am sorry to be obliged to admit that the Courts of justice have been deservedly censured for their vacillating decisions on the 21 Jac. I. c. 16. When by distinctions and refinements, which Lord Mansfield says, the common sense of mankind cannot keep pace with, any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the Statute; or if it be in the common law, settling it on some broad and intelligible principle. But this must be done with caution, otherwise we shall increase

The learned judge, however, thought that, according to the authorities, such an acknowledgment of the existence of the

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“the confusion that we attempt to get rid of; the authority of no one Court is sufficient in such a case. I will therefore go no further to-day, than I am authorized to go by the authority of modern decisions.” “Christianity forbids us to attempt enforcing the payment of a debt, which time and misfortune have rendered the debtor unable to discharge. The legislature thought that if a demand was not attempted to be enforced for six years, some good excuse for the non-payment might be presumed, and took away the legal powers of recovering it. I think, if I were now sitting in the Exchequer Chamber, I should say that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it the protection of the Statute of Limitations. But I should not, after the cases that have been decided, be disposed to go so far in this Court, without consulting the Judges of the other Courts. There are many cases from which it may be collected, that if there be any thing said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take a case out of the Statute of Limitations.”

In the case of *Tanner vs. Smart*, (6 Barnew. & Cress. Rep. 603,) Lord TENTERDEN, Ch. J. in delivering the Opinion of the Court, said, “There are undoubtedly, authorities that the Statute is founded on the presumption of payment, that whatever repels that presumption is an answer to the Statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt; and that though such an acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the Statute; and if these authorities be unquestionable, the verdict which has been given for the plaintiff ought to stand, and the rule for a new trial ought to be discharged. I refer to the cases of *Yea v. Fouraker*, 2 Burr. 1099. *Lloyd v. Maund*, 2 T. R. 760. *Bryan v. Horseman*, 4 East. 599. *Leaper v. Tatton*, 16 East, 420. *Douthwaite v. Tibbutt*, 5 M. & S. 75. *Frost v. Bengough*, 1 Bing. 266. *Rowcroft v. Lomas*, 4 M. & S. 457. *Swan v. Sowell*, 2 B. & A. 759. *Mountstephen v. Brooke*, 3 B. & A. 141. But if there are conflicting authorities upon the point, if the principles upon which the authorities I have mentioned are founded appear to be doubtful, and the opposite authorities more consonant to legal rules, we ought at least to grant a new trial, that the opportunity may be offered of having the decision of a Court of Error upon the point, and

debt must be deemed sufficient to take the case out of the statute;

"that for the future we may have a correct standard by which to act." And the rule for a new trial was made absolute.

In *assumpsit* for fees as an attorney at law, the defendant pleaded the Statute of Limitations in bar of the action—at the trial the plaintiff proved a letter received from the defendant after the services performed, but more than six years before the commencement of the suit, in which he promised to pay for the services claimed in this suit, and also proved that within six years past the defendant said to him, "If I owe you any thing on that claim I will pay you;—but I owe you nothing." Held, that this was not sufficient evidence of a new promise, to avoid the bar of the Statute of Limitations. *Parley vs. Little*, 3 Greenl. Rep. 97.

In an action of *assumpsit* for money due on an accountable receipt, the Statute of Limitations was pleaded, and the plaintiff in order to take the case out of the statute, called a witness who proved that he called upon the defendant and shewed him the receipt, and asked him if he knew any thing of it, to which the defendant answered, "yes, I know all about it." The witness then asked him for the amount, to which defendant answered. It was not worth a penny, he should never pay it. He admitted his signature to the receipt. The witness said, perhaps you have paid it, defendant answered, no, never, he never had, and never would, and added, "besides, it is out of date, and no law shall make me pay it." Held, that this evidence was not sufficient to charge the defendant with the debt, for there was no evidence, but the contrary that the debt ever existed. *Rowecroft vs. Lomas*, 4 Maule. & S. Rep. 457.

A qualified admission by a party who relies on an objection, which would at any time have been a good defence to the action, does not take a case out of the Statute of Limitations. *De La Torre vs. Barclay & Al.* 1 Starke. Rep. 6.

To a demand for the charges of preparing an annuity deed, the defendant said, "I thought I had paid it, but I have been in so much trouble since, that I really do not recollect it." The plaintiff answered, "you know the price of the annuity was paid you in a 1000*l.* bank note, which you changed at *Badcock's*." The defendant made no answer: Held, that this was not a sufficient acknowledgment of the debt to deprive the defendant of the benefit of his plea of the Statute of Limitations. *Hellings vs. Shaw*, 7 Taunt. Rep. 608. *Same Case*, 1 Moore's Rep. 340.

"A mere demand of a debt, without process, or any acknow-



though, if the matter had been *res integra*, the point might have

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"ledgment, is not sufficient to take the case out of the Statute of Limitations." *Hodde vs. Healey*, 1 *Ves. & Beams's Rep.* 540. (Per ELDON, LORD CHANCELLOR.)

In the case of *Scull and others, Administrators of Irwin, vs. The Executors of Wallace*, (In Error.—15 *Serg. & R. Rep.* 231, 233,) the plaintiff, below, examined *Scull*, one of the defendants below, as a witness, without objection. All the defendants below, pleaded the Act of Limitations; and it was *Held*, that the plaintiff below, would not be permitted, for the purpose of avoiding that plea, to ask *Scull* whether it was *his* intent to plead the Act of Limitations. And, although the question was left undetermined, whether an administrator may charge the estate of his intestate, by refusing to plead the Act of Limitations, although his co-administrator insist on pleading it? Yet it was decided, that if one stand neutral, the others may plead it. *TILGEMAN*, Ch. J. in delivering the Opinion of the Court, said; "A very important point was raised by the defendant's counsel, which it is unnecessary to decide, because it does not fairly arise from the evidence. This point was, whether one administrator may charge the estate, by refusing to plead the Act of Limitations, although his co-administrator insist on pleading it. But it is clear enough, by the evidence, that Mr. *Scull*, although he did not desire to plead the Act, and did not think it proper that it should be pleaded, was determined to act in such a manner as should leave the widow of *William Irwin* at liberty to avail the estate of that plea if she judged it right to do so. Mr. *McDonald*, a witness for the plaintiff, swore, that *Scull* told him he had no doubt that the estate of *Irwin* was indebted to *Wallace*, but how much he could not tell. But in the same conversation, *Scull* observed that *Mrs. Irwin* was outrageous about *Wallace's* claim, and was determined to plead the Statute of Limitations. She said, she would not pay a cent of it. *Scull* said, he would leave the matter to her altogether, and have nothing to do with it. And this was confirmed by *Scull*, in his own testimony in the strongest terms. For, he swore, that he never had an idea of depriving the other administrators of the benefit of the Act, if they chose to avail themselves of it. There was no contradiction in the evidence on this point, and the defendant's counsel had a right to the Court's Opinion, whether *Scull's* acknowledgment, taking it altogether, took the case out of the Act of Limitations. The law has been well settled by repeated decisions of this Court. The principle is this. A slight acknowledgment of an existing debt is sufficient to take the case out of the Statute; because the jury may and ought to presume a new promise; but the acknowledgment is to be taken altogether

admitted of doubt. And accordingly, by his direction, a verdict passed for the plaintiff.

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"er, and if, on the whole, it is inconsistent with a new promise, "no new promise shall be implied, and the Statute shall bar. "This is such plain common sense, that it is a wonder any opinion should ever have been held to the contrary. Now to apply the law to the evidence in this case, Mr. *Scull's* confession considered in *toto*, is altogether inconsistent with a promise to pay; because he expressly declared that Mrs. *Irwin* was determined to plead the Statute, and he would leave the matter to her, and would have nothing to do with it. I am at a loss for any argument to show the inconsistency of this acknowledgment with a promise to pay. The meaning is so plain that it is impossible to misunderstand it."

In England, all questions about the sufficiency of acknowledgments to revive claims barred by the Statute of Limitations, appear to be put at rest by a recent Act of Parliament. The Statute of 8 Geo. IV. "for rendering a written memorandum necessary to the validity of certain promises and engagements," passed 9th May, 1828, and which took effect from the 1st of January, 1829, is in substance as follows; Sect. 1. Recites the Statutes of Limitations of 21. *Jac. I. c. 16.* and 10 *Car. (Irish Act)*, "and also that various questions had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the "statutes," and that it was expedient to prevent such questions; enacts, that in actions of debt or upon the case grounded on any simple contract, no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. Joint contractors, or executors or administrators of any contractor, shall not be chargeable in respect of any written acknowledgment of his contractor, &c. But this enactment is not to alter, take away, or lessen the effect of any payment of principal or interest, made by any person whatsoever. In actions against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other, or others of the defendants, by virtue of a new acknowledgment or promise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants

It was moved to set aside the verdict, and have a new trial, on the ground that the implied promise of payment from a subsequent acknowledgment may be rebutted; as, where the acknowledgment is accompanied with a positive declaration that the party did not consider himself bound in law to pay the debt; otherwise, the very plea of *non assumpsit infra sex annos*, which is an acknowledgment of an antecedent debt, might be strained into a promise. But if an acknowledgment and an avoidance, when put in the form of a plea upon the record, be a good defence, it cannot overset the plea when tendered [\*193] in evidence. The rule to show cause was granted, after some hesitation. But when cause was to have been shown, the court said, that whatever their opinion upon the statute might have been had the question been new, yet, after the long train of decisions upon the subject, it was necessary to abide by the construction which had been put upon it; in conformity with which, they thought themselves bound to hold, that what was said by the defendant was a sufficient acknowledgment of the pre-existing debt to create an *assumpsit*, so as to take the case out of the statute of limitations.

An offer, authorized by the defendant, of two shillings and sixpence in the pound, is a sufficient acknowledgment to take the case out of the statute.(a)

But an acknowledgment by the defendant that he was guilty

(a) 2 Camp. 11

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“against whom he shall recover, and for the other defendant or defendants against the plaintiff.”

In the 3d Section it is declared, that “No indorsment or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statutes.”

of a breach of contract, does not show that the plaintiff has any cause of action that has accrued within six years.(a)[1]

In an action for not accepting and paying for a set of prints from the plays of Shakespeare, according to the undertaking into which it was alleged the defendant had entered by subscribing to the work, to which the defendant pleaded the statute of limitations; it appeared, that in December, 1786, the plaintiff proposed publishing by subscription a series of large

(a) 2 Camp. 157.

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[1] In an action of *Assumpsit*, the declaration stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of England, to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do: The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff 'till within six years. On the discovery being made, the defendant said that it was owing to the omission of his clerk, and that he, the defendant, was responsible. *Held*, the Statute of Limitations having been pleaded, that upon this form of declaration the plaintiff was not entitled to recover; and *Held also*, that upon this record such an acknowledgment was not sufficient to take the case out of the Statute. *Short vs. McCarthy*, 3 *Barnew. & Ald. Rep.* 626.

Declaration, that defendant, on consideration, &c. promised to invest plaintiff's money on good security: Breach, that he invested it on bad security: Pleas, General Issue and Statute of Limitations: Replication, that defendant promised as above within six years: Proof, that within that time the defendant acknowledged the security to be bad, and promised that plaintiff should be paid: *Held*, that plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied. DALLAS, Ch. J. said, "To revive a debt by promise, and take a case out of the Statute, there must be an antecedent debt; and if a promise should be made, when there is no antecedent debt, it would be necessary to frame a special declaration on such a promise." *Whitehead vs. Howard*, 2 *Brod. & Bingh. Rep.* 372.

An *assumpsit* after three years is not sufficient to take a case out of the Statute of Limitations against a carrier, it being founded on a tort. *Gallagher vs. Hollingsworth*, 3 *Harr. & M'Hen. Rep.* 122.

prints from some of the scenes in Shakespeare's plays; that seventy-two scenes were to be published, at the rate of two to each play; and the whole were to be published in numbers, each containing four large prints, at the price of two [\*194] guineas a number: that \*two guineas were to be paid at the time of subscribing, and on the delivery of each number, the remaining guinea for that was to be paid, together with two guineas in advance towards the succeeding number: that one number, at least, should be published annually. On the 7th of April, 1790, the defendant became a subscriber. The first number was published in June, 1791; the second in March, 1792; both of which were delivered to the defendant. The work was completed in 1803. Copies of the different numbers were regularly laid by for the defendant, but they were not called for; and he was never required individually to carry them away and pay for them till the year 1807.

It was contended by the plaintiff's counsel, that supposing the statute to have run as to each particular number from the time when that was published, the case had been taken out of the statute by the defendant's acknowledgment. A letter from the defendant was accordingly given in evidence, which was dated the 1st April, 1807, and in which he said, "I ceased taking in the numbers of the *Boydell Shakespeare* many years ago, in consequence of the engagement not having been fulfilled on the part of the proprietors; and not having been applied to from that time till very lately, I do not consider myself called upon to complete the set." It was likewise proved, that the defendant had lately observed, that "he had refused to take them in, because they did not answer his expectations."

Lord Ellenborough, without giving any decided opinion upon the general question, said, that the defendant's liability [\*195] could not be affected by the letter or declaration. \*He has only acknowledged that he was guilty of a default ten or twelve years ago. How does this show that the plaintiff has any cause of action which has accrued within six years?

If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment where the cause of action arises from the doing, or omitting to do, some act at a particular moment, in breach of a contract. This is like the case of criminal conversation, where the defendant being accused, shortly before the commencement of the suit, of having seduced the plaintiff's wife, said, he had not been guilty within six years. That allowed that there was once a cause of action, but the statute was held to be a bar.[1]

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[1] To an action on the case for a *deceit* in the sale of a Negro Wench, the defendant pleaded not guilty within six years, on which issue was joined. SPENCER, Ch. J. in *delivering the Opinion of the Court*, said; "The question then is, whether, if we consider the defendant as admitting the fraud, within six years, and declaring he was willing to do what was right, such admission and declaration can take the case out of the operation of the Statute. The plea was that the defendant was not guilty within six years; the replication is, that he was guilty within six years, next before the commencement of the suit. Now, it is inconceivable, how an admission of the fraud within six years, can render the party guilty of committing it anew. It was confessed when the sale took place, and any subsequent confession relates back to that period. The confession of the fact, does not prove a new fraud, but the first and original one. The plaintiff, in his replication, has undertaken to prove, that the defendant was guilty within the six years: Proving that he had acknowledged the fact within six years, is no proof that the Act was done within six years; and it does not support the issue. A case of this kind does not stand upon the same principle, as the acknowledgment of a debt within six years. There, the acknowledgment is evidence of a new promise; here, it is not evidence of a new trespass, and, therefore, there is no analogy between the two cases. This view of the case, satisfies me, that, without inverting all the rules of logic, (and special pleading has been aptly compared to logic,) it is impossible to say, that a confession of a *tort*, is a re-perpetration of it; and unless it is, the fact asserted in the replication, that the tort was committed within six years, is not made out, by a confession that the tort was committed more than six years before. *Oothout vs. Thompson*, 20 Johns. Rep. 278.

In the case of *Rucker v. Hannay*,<sup>(a)</sup> the defendant had stated to the court, in an affidavit for leave to plead the statute of limitations, that, "since the bill of exchange (on which the action was brought) became due, (which was more than six years before,) no demand for payment had been made on him;" and this was deemed sufficient to be left to the jury as an acknowledgment; and the jury having found a verdict for the plaintiff, the court refused to grant a new trial.

A letter written by a defendant<sup>(b)</sup> (who pleaded the statute of limitations) to the plaintiff's attorney, on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amount to an acknowledgment of the debt, so as to take it out of the statute of limitations.

[\*196] \**Assumpsit* for work and labour by the plaintiff, an attorney. Pleas, the general issue, and the statute of limitations. At the trial, at Hereford assises, in 1788, before Lord Kenyon, the plaintiff produced the following letter, written to his attorney by the defendant, in January in that year, in order to take this case out of the statute of limitations:—"I have lately been served, by Mr. Meredith Price, with a writ at the suit of one Lloyd. I am at a loss to know whether was it your orders, or was it some other of the same name. For sev-

(a) 4 East, 604.

(b) 2 T. R. 730.

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In the case of *Hurst vs. Parker*, (1 Barnew. & Ald. Rep. 92.) which was an action of trespass of breaking and entering Coal Mines and taking away Coals; the defendant pleaded *actio non accrevit infra sex annos*; to which the plaintiff replied in the affirmative. At the trial no evidence was given to shew that the trespass was actually committed within six years. Held, that evidence of a promise to make compensation, made by the defendant within six years before the commencement of the action, and when he was threatened with an action for taking away Coals, was not sufficient support to this issue; by which the plaintiff was bound to prove the affirmative, that he had a good cause of action within six years before the commencement of the suit.

eral reasons, I cannot suppose that an old particular friend would ever be guilty of causing an action to be commenced, without first advising him on it. I believe that you have had no cause to contradict my saying, that I always served you on all occasions that ever lay in my power; therefore, I flatter myself that you have no concern in this business. However, if it should appear to the contrary, I must beg leave to inform you, that before I will pay any cost more than defending, will absolutely take house in the liberty of Carmarthen, which, I am fully satisfied, will answer my expectations in business much better than here at Landoverly. As to Mr. P.'s views, I am no stranger at all to, and see through them without a spectacle; and as to your part, cannot expect to reap any benefit from that quarter, as he says you are indebted to him to the amount of 700*l*. Therefore, if you seriously consider your own interest, you cannot be any gainer by endeavouring to injure a man who has always been your friend. However, you are to act as you think proper. As in respect to matters between you and me, will be rectified when I can settle my affairs, which I believe will now soon be. Mr. Rice Davies, of Swansea, has received positive orders from Mr. R. Price and son, to sell the Erwastod and Combdw estates, and will \*be [\*197] advertised soon. I cannot believe that they will be sufficient to discharge the mortgage, and Mr. Davies's demand, which amounts, in cash lent, and business done, to 1,000*l*."

The learned judge, being of opinion that this did not amount to a promise, or acknowledgment of the debt, so as to take it out of the statute of limitations, nonsuited the plaintiff.

A rule was obtained, and cause shown, why the nonsuit should not be set aside, and a new trial granted. Lord Kenyon, Ch. J. having tried the cause, declined giving any opinion upon subject.

Ashhurst, J. said, the only doubt in his mind was, whether the letter should not have been left to the jury for them to form



their opinion upon it. For it was certainly true, that any acknowledgment would take the case out of the statute of limitations. Though this letter was written in ambiguous terms, there are some parts of it from which the jury might perhaps have inferred an acknowledgment of the debt. Throughout the whole of it the defendant does not deny the existence of the debt. He begins with reproaching the plaintiff for not giving him some information of his intention to bring an action against him; and then he says, in substance, "that sooner than pay the costs he will go to gaol." And in another part he adds, "As to the affair between you and me, it will be rectified soon." That, perhaps, did contain an insinuation that something was due; and he thought the jury should have put their construction on it.

[ \*198 ] \*Buller, J. said, that it had been held that the slightest acknowledgment would take the case out of the statute of limitations; as, where the defendant said, "I am ready to account, but nothing is due to you." The defendant, in his letter, affects not even to know at whose suit the action was commenced; but it was evident that that was merely a pretence. The whole of it was a begging letter, and it was evidently intended to gain time; and he was of opinion that it should have been left to the jury.

Grose, J. observed, that the letter seemed to him to be rather more than a begging letter: for it was intended to deter the plaintiff from going on with his suit, by threatening him, that, though he should succeed in the action, he should gain nothing by it. Now, if nothing were really due at that time, the attempt to hinder the plaintiff from proceeding in the action would be absurd: therefore, he thought that letter was exceedingly strong from which to infer an acknowledgment of the debt.

In an action for goods sold and delivered, (a) to which the defendant pleaded the general issue, and the statute of limitations.

(a) 1 New. Rep. 20.

At the trial before Lord Alvanley, Ch. J. at the sittings after Hilary term, 1804, it appeared that the debt had been contracted above six years before the commencement of the action; that the defendant having been applied to for payment of the debt by a letter from the plaintiff, dated the 23d of July, 1803, wrote to the plaintiff on the 26th of the same month, in the following terms: "I have received your letter of the 23d, and must refer you to Messrs. C., my solicitors, whose opinion \*always governs me. I recommend you to [\*199] call on them, as it will save you the trouble of a journey to W. They are in possession of my determination and ability." In consequence of this letter, a person on behalf of the plaintiff having called on Messrs. C., and stated that he came on account of the defendant's bill, was informed by them that the defendant was out of town, but that, if the plaintiff had any letter which would bind the defendant, the debt would be paid, if it amounted to 100*l*.

Lord Alvanley considered himself bound by the case of *Lloyd v. Maud*, 2 T. R. 760. to leave it to the jury to decide whether the above letter, coupled with the subsequent conversation at Messrs. C.'s, amounted to an acknowledgment of a debt.

The jury found a verdict for the plaintiff.

A rule *nisi* for a new trial having been obtained on a former day.—

Sir James Mansfield, Ch. J. said, the letter written by the defendant in the case of *Lloyd v. Maud* was very different from that written by the defendant in this case. The turn of the letter in that case was, that it was unjust that the plaintiff should do any thing to injure the defendant; and that, rather than pay any costs beyond those of defending the action, the defendant would go to gaol. But how could the plaintiff send the defendant to gaol, unless some debt was due? In the present case,

although the term "ability" might seem to import that the defendant owed something that he could not pay, yet he did not think there was sufficient in that expression unexplained [\*200] to take the case out of the statute. When the case is tried again, the plaintiff might examine Messrs. C. as to the defendant's ability, and as to any determination he had communicated to them respecting payment of the demand.

Heath and Rooke, Js. concurring, the rule was made absolute.

So, in *assumpsit* brought to recover the amount of a bill of exchange drawn on the defendant and Lord Cork, in favour of the plaintiff. The defendant pleaded the statute of limitations. The bill, at the time of the action brought, was of near nineteen years' standing; which was relied upon by the defendant's counsel as affording the strongest presumption that the debt had been satisfied; the defendant having been at all times in a situation to be sued for it. To support a new promise within the six years, the plaintiffs replied that the defendant, having become much involved, had assigned his estates to trustees for payment of his debts; and in answer to an application for payment of this money in the year 1792, had written the following letter to plaintiffs:

"I received your letter, and beg leave to refer you to my trustee, Mr. H. Wall, of Paper Buildings, on this complicated business. I should be glad to be informed how you have settled it with Lord Cork.

"I am, &c.            Inchiquin."

But they gave no evidence of this trust, but they relied merely on this letter.

[\*201] \*Lord Kenyon ruled, that where a debt was established, (as here it was,) by proving the hand-writing

of the defendant to the bill, who relied on the statute of limitations, if the plaintiff gave any general evidence of acknowledgment, that it should be taken to apply to the debt in question; and that it should lie on the defendant to explain the promise so made, and show that it applied to some other demand. In the present case the demand was established; and the bill being drawn on Lord Cork, and his name being mentioned in the letter, fortified the construction that this letter applied to the demand on the bill in question. And as to the letter, his lordship thought it was an acknowledgment.

We have seen above, that a promise made by a debtor will revive a preceding debt; and that an acknowledgment of a debt is evidence of a promise to pay; and we have considered the evidence proper to be admitted to prove such acknowledgment. We now come to consider what effect the acknowledgment of one of the several parties to the same contract will have in restoring a debt, it being barred by the statute.[1]

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[1] In the case of *Johnson, Admr. &c. vs. Beardslee & Al* (15 Johns. Rep. 3, 4.) the COURT said; "The demand of the plaintiff was liquidated with John Beardslee, in 1805, and he died in 1806; consequently before the Statute of Limitations had attached on the debt. Within six years before this suit was brought, two of the defendants, and who were also executors of John Beardslee, admitted the demand, and promised payment." Judgment for the plaintiff. & Vide *Billings, Admr. &c. vs. Bogan*, 1 Hayw. Rep. 13.

But in the case of *Moore vs. White & Al*. (6 Johns. Ch. Rep. 373.) it was Held, That an acknowledgment or admission by an executor or administrator, will not bind the real assets in the hands of an heir or devisee, or of the people, by escheat, or affect the right of either of them to plead the Statute of Limitations.

And in the case of *The Executors of Fisher vs. The Representatives of Tucker*, (1 McCord's Ch. Rep. 175.) WATIES, Chancellor, in pronouncing his decree said; "It is however, contended that Heriot was the executor of Tucker, and that he has bound the estate by the bond to Fisher, and by the letter promising payment out of the estate. It would be sufficient to oppose to

In *Bland v. Haselrig*, (a) an *assumpsit* was brought against four, who pleaded the statute of limitations; and the verdict

(a) 2 Vent. 151.

"this argument the fact that the bond was not as executor, but as  
"surviving partner in behalf of the firm of *Heriot and Tucker*.  
"But if it had been given in the character of executor it would  
"not charge the estate of *Tucker*, for it has been repeatedly de-  
"cided that an executor does not possess such a power. He can-  
"not vary in any way the actual state of his testator's debts, and  
"therefore cannot revive a claim on the estate which has been  
"barred by the limitation act, or even prevent the running of the  
"act by his acknowledgment of it within the period of limita-  
"tion"

Loose conversations of an Executor will not raise an *assumpsit* to take a case out of the Statute of Limitations. *Henderson & Al. vs. Foote's Ex'ors.* 3 *CalP's Rep.* 248, 252.

Whether the acknowledgment of the agent of an executrix will take a case out of the Act of Limitations? *Quære. Lansdale's Ex'x. vs. Ghequiere, (On Appeal)* 4 *Harr. & Johns. Rep.* 257.

The heirs, or persons interested in the real estate of a deceased debtor, may appear before the surrogate, and oppose the application of the executor or administrator for a sale; and may interpose the Statute of Limitations, in the same manner as if they were sued by the creditor. For it must be shewn, that there are valid and subsisting debts beyond the amount of the personal estate, that is, debts not barred by the Statute of Limitations, before an order of sale is granted. *Mooers vs. White & Al.* 6 *Johns. Ch. Rep.* 389.

The Administrator of the drawer of a note wrote several letters to the executors of the indorsee recognising the existence of the demand, but declining to take up the note. He, however, finally wrote that he would be in town in a few days and *would settle the matter in some way.* Held, that this was sufficient evidence of a promise to pay. *Jones & Al. Ex'ors. &c. vs. Moore, Admr. &c* 5 *Bian. Rep.* 573.

Where an Administrator files as an exhibit in a suit in chancery, an account against his intestate in favour of A., it is a sufficient acknowledgment of such account to prevent the operation of the Act of Limitations. *Forbes vs. Perries' Admr.* 1 *Harr. & Johns. Rep.* 109, 112.

was, that one of the defendants did assume within six years,

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The acknowledgment or confession of one executor, of a debt due from his testator will bind a co-executor in a suit against him, so far as to prevent him from availing himself of the Statute of Limitations; but it will not be evidence of an original debt. *Hammon vs. Huntley & Al.* 4 Cow. Rep. 493, 494. *Johnson, Admr. &c. vs. Beardslee & Al.* 15 Johns. Rep. 3. & *Vide, Brown & Al. vs. Anderson, Admr.* 13 Mass. Rep. 203. *Emerson vs. Thompson & Al.* 16 Mass. Rep. 429. *Briggs vs. Exors. of Starke*, 2 Rep. Const. Ct. So. Car. 111. *Cobham, Assignee, &c. vs. Administrators*, 2 Hayw. Rep. 7.

An administrator cannot revive a debt due to himself from the intestate, which at the time of the intestate's decease was barred by the Statute of Limitations. *Richmond, Admr. &c.* 2 Picker. Rep. 567.

*It seems*, that if an endorser of a note, be *not liable* as endorsee, he would not be so far interested, by reason of an implied warranty of the genuineness of the note; as to preclude his being a witness to shew the maker's confession, so as to take the note out of the Statute of Limitations, after the maker's signature had been proved by another. *Baskins vs. Wilson*, 6 Cow. Rep. 471.

In an action against an executor, the plaintiff may state that the testator being indebted, &c. the executor, after the death of the testator, in consideration, &c. promised to pay; in order to save the Statute of Limitations. *Whitaker vs. Whitaker, Exor. &c.* 6 Johns. Rep. 112.

The admission of the wife, who was accustomed to conduct her husband's business, is sufficient to take the case out of the Statute of Limitations, in an action against the husband. *Anderson vs. Sanderson*, 1 Holt's Rep. 591.

In the case of *Smith, Administrator of Walker, vs. Daniel & Gulian Ludlow*, (6 Johns. Rep. 267.) which was an action of *Assumpsit*; the declaration contained seven counts. The defendants pleaded *non assumpsit*; and *non assumpsit infra sex annos*, on which the issue was joined. It appeared that *D. & G. Ludlow*, being partners, dissolved their partnership on the 31st of December, 1801, and gave notice in the Gazette of the dissolution, and that *D.* was authorized to receive all payments, and adjust all accounts relative to the partnership. Previous to the commencement of the suit, (*viz.* in June, 1808,) the plaintiff called on the defendant *Gulian* and request-

and the other *non assumpti*. And it was held by the court, (dis-

ed a settlement of the account of the intestate, and the defendant G. then admitted the account, (marked A.,) dated *November 30th, 1797*, to have been made out by him, and said he thought the account of the defendants with *Walker* had been settled by the other defendant in whose hands the Books of the partnership were; and that he would see the defendant *Daniel* on the subject, and would communicate the result to the plaintiff. This was held a sufficient acknowledgment of the debt to take it out of the Statute of Limitations; the COURT said, "This was equivalent to saying, that if 'the account had not been settled, it should be settled and paid.'" The plaintiff further gave in evidence an account dated *January 1st, 1808*, signed by *D. Ludlow and Co.*, which was objected to, as being made out and signed by *D. Ludlow*, after the dissolution of the partnership. The COURT, however, said; "But the acknowledgment by *Daniel Ludlow*, the other partner, was more decisive. He made out an account with the plaintiff, as late as *1st of January, 1808*, in which the intestate was credited with the 'cash advanced for the bank shares. This account was made out after the dissolution of the co-partnership; but in the notice of dissolution it was announced to the public, that the defendant *Daniel* was authorized to adjust all accounts relating to the partnership. Without this express authority, the confession of one partner, after the dissolution, will take a debt out of the Statute. The acknowledgment will not of itself, be evidence of an original debt, for that would enable one party to bind the other in new contracts. (*Hackley v. Patrick*, 3 Johns. Rep. 536.) But the original debt being proved, or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the Statute of Limitations. This is evident from the cases of *Whitcomb vs. Whitney*, and of *Jackson v. Fairbank*, (Doug. 652. 2 H. Black. 340.) and it results necessarily from the power given to 'adjust accounts.'" & Vide to the same effect, *Shelton vs. Cocke & Al.* 3 Munf. Rep. 191. *M'Intire & Co. vs. Oliver, Survivor, &c.* 2 Hawk's Rep. 209. *Executors of Fisher vs. Representatives of Tucker*, 1 McCord's Ch. Rep. 172, 177.

In the case of *Ward vs. Howell & Al.* (5 Harr. & Johns. Rep. 60, 61.) "The only question was, whether the admissions of one partner after the partnership is at an end, are evidence against the rest of the partners. THE COURT [of appeals of Maryland] were of opinion, that the evidence was not sufficient to charge the partnership with a debt, though it would be sufficient to take such a debt out of the Statute of Limitations."

In the case of the *Executors of Fisher vs. Representatives of Tuck-*

and Ventris, J.) that the plaintiff could not have judgment

er, (1 *McCord's Ch. Rep.* 190.) NOTT, J. delivering the decision of THE COURT OF APPEALS, said; "I concur in the general course of reasoning which the Chancellor has adopted in this case, and the conclusion at which he has arrived. How far the acknowledgments of one partner of the existence and amount of a debt may be evidence to bind another, after a dissolution of the co-partnership, is a question respecting which different opinions have been entertained. In the cases of *Hackley v. Patrick*, 3 Johns. Rep. 536, *Smith v. Ludlow*, 6 Johns. Rep. 267, and *Chardon v. Calder*, 4 C. 2 Const. Rep. Tread. Edit. 685, the Court seemed to have thought that the confession of one could not bind the other. But in the case of *Wood v. Braddick*, 1 Taunt. 104, *Simpson & Morrison v. Geddes*, 2 Bay, 533 and *Reimsdyck v. Kane and others*, 1 Gallison, 630, contrary opinions are expressed. Such evidence is unquestionably sufficient to save a case from the operation of the Statute of Limitations; and I think it admissible as to the existence of the debt, but I cannot think it conclusive. The Court must be allowed to give it such credit only as under the circumstances it appears entitled to."

In the case of *Wood & AL Assignees, &c. vs. Braddick* (1 Taunt. Rep. 104.) upon issue joined in the Pleas of the General Issue and the Statute of Limitations, it was Held, that an admission made by one of two partners after the dissolution of the partnership, concerning joint contracts that took place during the partnership, is competent evidence to charge the other partner.

But in the case of *Clementson vs. Williams*, (8 Cranch's Rep. 72, 74.) which was a suit instituted by the plaintiff against James Williams and John Clarke, merchants and partners, trading under the firm of *John Clarke & Co.*, the writ was executed on Williams only, who pleaded *Non Assumpsit* and the Act of Limitations, on which issue was joined; a witness proved that in December preceding the trial he presented to John Clarke, a certain account against the said John Clarke & Co. in favour of the plaintiff; and that said Clarke stated "that the said account was due, and that he supposed it had been paid by the defendant, but had not paid it himself, and did not know of its ever being paid:" under the opinion of the COURT the Jury found for the defendant, and judgment was entered in his favour, and upon Error brought, MARSHALL, Ch. J. delivering the opinion of the Court, said; "In the case at bar, the acknowledgment of John Clarke is that he had not discharged the account presented to him, but he does not say that it was not discharged. His partner may have paid it without the knowledge of Clarke, and, consequently, the declaration of Clarke that he had not himself paid it, and that he



against the defendant, who was found to have promised within six years.

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"did not know whether his partner had paid it or not, is no proof  
"that the debt remains due, and therefore is not such an acknow-  
"ledgment as will take the case out of the Statute of Limita-  
"tions." & *Vide Marshall vs. Dalliber*, 5 Conn. Rep. 486.

And in the case of *Wetzell vs. Bussard*, (11 Wheat. Rep. 314.) MARSHALL, CH. J. in delivering the opinion of the Court, cited the case of *Clementson vs. Williams*, (8 Cranch. Rep. 72.) and said; "In that case, a declaration by one partner that the account was originally due, and that he had never paid it, and did not know that it had ever been paid, but supposed his partner had discharged it, was declared to be insufficient to take the case out of the Statute. It is true, that the partnership was dissolved when this declaration was made, but the Court did not put the case on that point. It was determined on the insufficiency of the acknowledgment."

And in the case of *Bell vs. Morrison & Al.* (1 Peter's Rep. Sup. Ct. U. S. 373.) STORY, J. in delivering the Opinion of the Court, said; "When the Statute of Limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct; and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think, that the power to create such a right does not exist after a dissolution of the partnership in any partner."

The above case, at page 369, also contains the following note:

"The Reporter has been informed, by Mr. Chief Justice Gibson, that, at the December Term, 1827, of the Supreme Court of Pennsylvania, the Court decided, after full argument, that the acknowledgment by a partner, after the dissolution of the partnership, will not take the debt out of the Statute, so as to make the other former partners liable. This case will be reported by Messrs. Sergeant & Rawle."

And no acknowledgment of the principal debtor, made subsequent to the contract, can take the case out of the Statute of Limitations as to his guarantor or surety. *Meade vs. McDowell*, 5 Binn. Rep. 195.

A new promise by an Executor or Administrator, within six

\*This case may be explained on the manner of the [\*202] finding; for as the plea was joint, and the replication must have alleged a joint undertaking, the verdict did not find

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years, takes the case out of the Statute of Limitations; as well in an action against an Administrator *de bonis non*, as against the original Executor or Administrator, who made the promise. *Emerson vs. Thompson & Al.* 16 *Mass. Rep.* 429.

An Executor is not bound to plead the Statute of Limitations to a debt which he believes to be a just one; and his acknowledgment will prevent the Statute from running against it. *Walter & Uz. vs. Radcliffe, Admr. &c.* 2 *Eq. Rep. (Dessauss.)* 557. & *Vide Cobham, Assignee, &c. vs. Administrators,* 2 *Hayw. Rep.* 7.

CONTRA; *Heard vs. Meader.* 1 *Greenl. Rep.* 157. *Lafon's Heirs vs. his Exors.* 3 *Mart. Rep. (N. S.)* 707.

A suit was brought against several persons, who were the heirs and devisees of a deceased Debtor; two of the Defendants, who were also his Executors, promised to pay the debt. The Court said; "With respect to the other Defendants, who have not acknowledged the demand or promised to pay it, the acknowledgment of one joint debtor, of the existence of the debt, is sufficient to take the case out of the Statute. (*Smith v. Ludlow,* 6 *Johns. Rep.* 267. 2 *H. Bl.* 340. *Doug.* 652.) The Court see no reason why that principle should not apply to the case of "Executors, heirs and devisees, as well as to every other case." *Johnson, Admr. &c. vs. Beardslee & Al.* 15 *Johns. Rep.* 3, 4. & *Vide White vs. Hale & Al.* 3 *Picker. Rep.* 291.

But in the case of *Thompson vs. Peter & Al. Admr. &c.* (12 *Wheat. Rep.* 565, 566,) it was Held, that an acknowledgment of the debt by the personal representatives of the original debtor, deceased, will not take the case out of the Statute of Limitations. And MARSHALL, Ch. J. in delivering the Opinion of the Court, after adverting to the acknowledgments proved, said; "Had this even been a suit against the original debtor, these declarations would not have been sufficient to take the case out of the Statute. The cases cited from 8 *Cranch's Rep.* 72, and 11 *Wheat. Rep.* 209, are expressly in point. But this is not a suit against the original debtor. It is brought against his representative, who may have no personal knowledge of the transaction. Declarations against him have never been held to take the promise of "a testator or intestate out of the Act. Indeed, the contrary has been held."

what the plaintiff had bound himself to prove. But at the pres-

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In *assumpsit* by S. S. as surviving partner of S. & J. S. the declaration stated the promises to be to S. & J. S. in the life-time of J. S. The Act of Limitations was pleaded, and to take the case out of that act, evidence was offered of a promise made to S. S. after the death of J. S. Held, that the evidence was sufficient to avoid the Statute; and that there was no necessity to declare specially on the promise to the Plaintiff, as surviving partner. And CHASE, Ch. J. who delivered the Opinion of the Court, said; "The case of a surviving partner is distinguishable from that of an Executor. An express promise made to an Executor creates an *assumpsit* to him, and is founded on the antecedent consideration of a debt due to the Testator, and a count in the declaration must be framed on it, and the proof must correspond with and be adapted to it; the money when recovered will be assets in the hands of the Executor, and he will be accountable for it. A surviving partner has a right to all the effects belonging to the partnership, and to receive, sue for and recover, all the debts due to the partnership. The right and remedy are united in him, the original promise made to him, and his deceased partner, still exists, and the right of action with the remedy survived to him. The acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar by the Act of Limitations. It does not create a new *assumpsit*, but is a saving of the remedy on the original promise. The surviving partner is accountable to the creditors of the firm, and to the representatives of the deceased partner." *Barney vs. Smith, (On Appeal), 4 Har. & Johns. Rep. 485. 495.*

The Plaintiff, who was the surviving partner of J. and C. Allstan, and the Administrator of C. Allstan, his deceased partner, brought an action of *assumpsit* against the Defendant, who was the surviving partner of T. and A. Contee, and the Executor of A. Contee, his deceased partner. The Defendant pleaded the general issue and the Act of Limitations. A witness for the Plaintiff testified that A. Contee, in his life time, informed the witness that T. and A. Contee, owed the house of J. and C. Allstan, upwards of, or between 9 and 10,000 dollars. The Plaintiff also produced and read in evidence, sundry letters admitted to have been written, some of them by T. Contee, and the others by A. Contee, to J. and C. Allstan, acknowledging themselves indebted to A. and C. Allstan, and promising payment, making mention of accounts received but not examined; &c. Held, that such acknowledgments were sufficient to take the case out of the Act of Limitations. *Allstan's Admr. vs. Contee's Ex'r. (In Error), 4 Har. & Johns. Rep. 351.*

ent day, upon the principle of subsequent decisions, the jury ought to have considered the promise of one as the promise of all; and therefore should have found a general verdict against all.

The acknowledgment of one out of several drawers of a joint and several promissory note, takes it out of the statute of limitations as against the others, and may be given in evidence on a separate action against any of them.[1]

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A promise by an Administrator to pay a debt of the intestate, will not take the demand out of the Statute of 1791, c. 28, [Massachusetts,] limiting suits against Administrators to four years. *Brown & Al. vs. Anderson, Admz. &c.* 13 *Mass. Rep.* 201. *Dawes, Judge, &c. vs. Shed & Al. Exors. &c.* 15 *Mass. Rep.* 6. & *Vide Emerson vs. Thompson & Al.* 16 *Mass. Rep.* 429. *Heard vs. Meader,* 1 *Greenl. Rep.* 157.

Et Vide Stat. 9 Geo. IV. (Cited, page 191, at the end of note [1.] )

[1] By the 1st section of the statute of 9 Geo. IV. passed 9th May, 1828, (and which went into operation on the 1st day of January, 1829.) Joint contractors, or executors or administrators of any contractor, shall not be chargeable in respect of any written acknowledgment of his co-contractor, &c. But this enactment is not to alter, take away, or lessen the effect of any payment of principal or interest, made by any person whatsoever. In actions against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other, or others of the defendants, by virtue of a new acknowledgment or promise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

A partial payment made on a note by the principal promissor, will take the debt out of the Statute of Limitations as to the surety. *Hunt, Ex'or. &c. vs. Bridgham & Al.* 2 *Picker. Rep.* 581.

And an acknowledgment will have the same effect, *Frye vs. Barker & Al.* 4 *Picker. Rep.* 382.

In an action on a promissory note, (a) tried before Hotham, Baron, at the Spring assises, in Hampshire, in the year 1804,

(a) Doug. 629.

The acknowledgment of a debt barred by the Statute of Limitations, by one of several joint debtors, is sufficient to take the case out of the Statute as against all. *White vs. Hale & Al.* 3 *Pick. Rep.* 291.

The acknowledgment of one of several joint makers of a promissory note, takes it out of the Statute of Limitations as against the others. *Bound & Al. vs. Lathrop*, 4 *Conn. Rep.* 336.

An acknowledgment within six years by one of the joint makers of a promissory note will revive the debt against the others, although that other has made no acknowledgment, and only signed the note as surety. *Perham vs. Raynal & Al.* 2 *Bingh. Rep.* 306.

If A. guarantee to B. the performance of any contract which B. may make with C., and six years elapse after the contract between B. and C., and before the bringing of the suit against A. upon his guaranty, no acknowledgment by C. subsequent to the contract, can take the case out of the Statute of Limitations as to A. *Meade vs. McDowell*, 5 *Binn. Rep.* 195.

In order to take a case out of the Statute of Limitations in an action on a promissory note it is not sufficient to shew a payment by a joint maker of the note to the payee within six years, so as to throw it upon the Defendant to shew that the payment was not made on account of the note. An acknowledgment by one partner to bind another in such case must be clear and explicit. *Holme vs. Green*, 1 *Starkie's Rep.* 397.

But in the case of *Brandram & Al. vs. Wharton* (1 *Barnew. & Ald. Rep.* 467.) LORD ELLENBOROUGH, CH. J. said; "This doctrine of rebutting the Statute of Limitations by an acknowledgment other than that of the party himself, began with the case of *Whitcomb v. Whiting*. [Doug. 652.] By that decision, where however there was an express acknowledgment by the actual payment of a part of the debt by one of the parties liable, I am bound. But that case was full of hardship. For this inconvenience may follow from it; suppose a person liable jointly with thirty or forty others to a debt, he may have actually paid it, may have had in his possession the document by which that payment was proved, but may have lost his receipt: then, though this

(to which the defendant pleaded the statute,) the plaintiff pro-

"was one of the very cases which the statute was passed to protect, he may still be bound, and his liability be revived by a random acknowledgment made by some one of the thirty or forty others who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the Statute, by means of an implied acknowledgment. No case can be cited except *Jackson vs. Fairbank*, (2 *Hen. Black.* 340.) where this has been done, and in that case there is wanting one material circumstance which exists in *Whitcomb v. Whiting*, for in the latter case the party who revived the debt by his acknowledgment, became himself liable to contribute to it, but in *Jackson v. Fairbank*, the acknowledgment, besides being a constructive one, was made by parties who never could be called upon for contribution." BAYLEY, J. said, "This case is also distinguishable from that of *Jackson v. Fairbank*, although certainly, for the reasons stated by Lord *Ellenborough*, I should doubt of the propriety of that decision." And ABBOTT, J. said, "If it were necessary in this case to overrule *Jackson v. Fairbank*, I should require further time to consider it, although I am by no means satisfied that that was a sound or good decision." & Vide to the same effect—*Bell vs. Morrison & Al.* 1 *Peter's Rep.* (Sup. Ct. U. S.) 368. *Roosevelt vs. Marks*, 6 *Johns. Ch. Rep.* 291.

And in the case of *Porter vs. Blood*, (5 *Picker. Rep.* 54, 57.) where one of the joint makers of a promissory note had delivered goods to the plaintiff to be by him sold; and the proceeds of such sale applied to the discharge of the note; and the amount was endorsed by the plaintiff within six years before suit brought; which endorsement it was contended, would avoid the defendants plea of the Statute of Limitations; WILDE, J. delivering the Opinion of the Court, said; "The case supposed to be most in point by the plaintiff's counsel is that of *Jackson v. Fairbank*, 2 H. Bl. 340. But this case has been very much shaken by that of *Brandram v. Wharton*, 1 B. & A. 463. We do not, however, deem it necessary to express an opinion as to these cases; because the plaintiff does not attempt to avoid the Statute of Limitations, by showing, that he was acting under the authority of a joint promisor with the defendant, but by the direction of the defendant himself. And it cannot be doubted, if he was so directed, his acts in pursuance of the direction will bind the defendant."

A. and B. made a joint and several promissory note. A. died, and ten years after, B. who was one of A.'s Executors, paid, in his

duced a joint and several note, signed by the defendant, and three others, and having proved payment, by one of the others, of interest of the note, and part of the principal, within six years, and the judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

A rule was afterwards granted to show cause why there should not be a new trial, on the motion of Lawrence, who cited *Bland v. Haselrig*. And in support of the application he contended, that the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only [ \*203 ] by the defendant; and therefore, whatever \*might have been the case in a joint action, in this case the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a

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individual character and not as Executor, interest upon the note. In an action brought upon the note against the Executors of A., it was held that the payment of interest by B., did not take the case out of the Statute of Limitations, so as to make A.'s Executors liable. *Abbott*, Ch. J. said, "I think there is no evidence of a promise by all, and certainly not such as to take the case out of the Statute of Limitations. The evidence was, a payment of interest by Robert Tredgold in his own right. *Whitcomb v. Whiting* was relied upon to show that such payment would take the case out of the Statute of Limitations. It is not necessary to say whether that case, which is contrary to a former decision in *Ventris* would be sustained, if reconsidered; but I am warranted in saying, by what fell from Lord Ellenborough in *Brandram vs. Wharton*, 1 B. & A. 463, that it ought not to be extended. The payment was by one of several originally liable. Here we are called upon to go further, and say, that a payment by one of several, liable alieno jure, shall raise an implied promise by them all. Such a decision would introduce great difficulty in administering the affairs of Testators. Suppose an Executor to have waited six years, and then no claim having been made, to dispose of the assets in payment of legacies. He might, if the Plaintiffs were to prevail, be subsequently rendered liable to the payment of demands to any amount, by the acknowledgment of a person originally joint debtor with the Testator. The inconvenience and hardship arising from such a liability, satisfies me that the principle of *Whitcomb v. Whi-*

new promise, but is only evidence of a promise. This was determined in the case of *Heylin v. Hastings*,<sup>(a)</sup> and in *Humings v. Robinson*.<sup>(b)</sup> He said, that it was decided, that the confession of nobody, but a defendant himself, is evidence against him. That last case was an action by an endorsee of a note against the drawer; and the plaintiff proved the acknowledgment of a mesne endorser, that the endorsement on the back of the note was in his hand-writing; but the court was of opinion, that this was not evidence against the drawer, but that the endorsement must be proved. It would certainly open a door to fraud and collusion, if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord Mansfield said, the question here is, only whether the action is barred by the statute of limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

Willes, J. said, The defendant has had the advantage of the partial payment, and therefore must be bound by it.

(a) 12 Mod. 228. 1 Salk. 20.

(b) Barnes, quarto edit. 434.

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"ting, ought not to be extended to this case." BAYLEY, J. observed, "It is said, that a joint promiser having made a payment within six years, the Executors of the other are liable; and the case of *Whitcomb v. Whiting* is relied upon. That is certainly a very strong case, and it may be questionable whether it does not go beyond proper legal limits." HOLROYD, J. said, "I, also, am of opinion, that the circumstances of this case do not take it out of the Statute of Limitations. *Whitcomb v. Whiting* is the only case that can be relied on by the Plaintiffs. That case has gone far enough; but it does not govern the present." And BEST, J. said, "The present case is therefore distinguishable from *Whitcomb v. Whiting*; beyond which I think the Court ought not to go." *Atkins, Exors. &c. vs. Tredgold & Al. Exors. &c.* 2 Barnew. & Cress. Rep. 23.



CH. 9.]

*What restores the Remedy.*

[\*204] \*Ashhurst and Buller, Js. of the same opinion.

The Rule was discharged.

And where one of two makers of a joint and several promissory note having become a bankrupt, the payee received a dividend under the commission on account of the note, that will prevent the other maker from availing himself of the statute of limitations, in an action brought against him for the remainder of the money due on the note, if the dividend had been received within six years before the action brought.[1]

James Fairbank, and William Fairbank his son,(a) made their joint and several promissory note, on the 18th July, 1784, to the defendant, for 100*l*. In the same year James Fairbank became a bankrupt, and the plaintiff received several dividends under the commission, in respect of the 100*l*. secured by the

(a) 2 H. Bl. 340.

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[1] In the cases of *Dewdney, ex parte, & Seaman, ex parte*, (15 *Ves. Rep.* 499.) ELDON, LD. CHANCELLOR, said, "It is decided that the payment of a dividend under a commission-[of Bankruptcy] against one partner, upon a debt within the Statute of Limitations, raises a new assumpsit by the other."

But in the case of *Brandram & others vs. Wharton*, (1 *Barnew. & Ald. Rep.* 463.) where one of two joint drawers of a Bill of Exchange became bankrupt, and under his commission the indorsees prove a debt (beyond the amount of the bill) for goods sold, &c. and they exhibited the bill as a security they then held for their debt, and afterwards received a dividend; it was held, that in an action brought by the indorsees of the bill against the solvent partner, that the Statute of Limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years.

A payment by trustees, or by the assignees of a bankrupt, not being parties to the original contract, will not amount to an acknowledgment of the original debt, so as to take it out of the Statute of Limitations. *Roosevelt vs. Mark's, & Johns. Ch. Rep.* 292.

note in question; the last of which was paid in the course of the year 1793; and there remained due 58*l.* 6*s.* 8*d.* for which an action was brought. The defendant pleaded the statute of limitations, but a verdict was found for the plaintiff, under the direction of Mr. Justice Heath.

A rule being granted to show cause why there should not be a new trial, the question was, whether the payment of part of the money due on the note by the assignees took the case out of the statute of limitations?

It was contended for the plaintiff, that the act of the assignees was the act of the bankrupt himself: and if the \*bankrupt had acknowledged of paid part of the debt, [ \*200 ] the presumption raised by the length of time would have been repelled. That it had been decided in *Whitcomb v. Whitting*, (a) that the acknowledgment of one of several drawers of a joint and several promissory note takes it out of the statute of limitations as against the others, and might be given in evidence in a separate action against any of the others.

It was insisted, on the other hand, that, as the bankrupt himself had, done no act to acknowledge the debt, the case came within the statute of limitations, of which the assignees of one of the drawers could not prevent the other from availing himself.

But the court were clearly of opinion, that the payment of the dividend under the commission was such an acknowledgment of the debt as took the case out of the statute of limitations.

In a subsequent case at *Nisi Prius*, in Easter term, 40 Geo. III. (b) in the king's bench, *assumpsit* was brought for money paid, laid out, and expended to the use of two defendants; to which was pleaded the statute of limitations by one of them.

(a) Doug. 661.

(b) 3 Esp. 258.

The defendants had formerly carried on business as merchants in Cork, in Ireland, and had become bankrupts. While they carried on trade, the plaintiff had given his guaranty to Messrs. Hammerslys, the bankers, to secure any advances made to the defendants in consequence of their intercourse with England.

The bankers had made advances for their use to the [\*206] amount of 1,800*l.* but the plaintiff had not been \*called upon on his guaranty until after the bankruptcy of the defendants, when he paid the money, and now brought his action against them for money paid to their use. One of the defendants let judgment go by default; and the plaintiff relied upon a letter written by him in the course of the preceding year, as containing promises to pay, and an acknowledgment sufficient to bind the other defendant. [1]

It was contended that this promise was of no avail, as it was made at the time when the defendant was a bankrupt; and, at all events, it could not bind the other defendant.

On the other hand it was contended, that this was a debt contracted by the two defendants while in partnership, and on their joint account, and cited *Whiting v. Whitcomb*, and what was the case where the demand arose under an express contract, as in the case of notes equally applied, to the implied contract, where the money was paid on account of the two.

Lord Kenyon said, he had some doubts upon the point, and would reserve the case. But an acknowledgment by the defendant being proved, the plaintiff had a verdict.

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[1] Vide Ante, page 201, N. [1], and page 202, N. [1.]

*Of Pleading the Statute.*

THIS statute, and also the 32 H. VIII. c. 2. of limitations, are exceptions to the rule, "that where an action is required by statute to be brought within a certain time, it is the duty of the plaintiff to prove that he has done so, or he will fail in his suit.

The statute 31 Eliz. c. 5. s. 5. which limits actions upon penal statutes to two years after the commission of the offence, where the forfeiture is given to the king only, and to one year, where it is to the king and any other person, is conceived in terms almost similar to the present: and it seems, that the defendant may take advantage of that statute on the general issue, and need not plead it; the practice at *Nisi Prius* being, for the defendant to call upon the plaintiff to prove the commencement of his action within the limited period; and many questions arise as to what shall be said to be the proper commencement of it: (a) but the defendant must plead the statute if he mean to take advantage of it; although the cause of action appear on the declaration to have accrued more than six years before: for it is settled, that the statute of limitations does not destroy the debt; it only takes away the remedy: [1] and the debtor may either \*take advantage of the statute, if [ \*208 ] the debt be older than the time limited for bringing the action, or he may waive the advantage. (b)

In a case in the king's bench, 15 Car. II. the declaration was

(a) 2 Sourd. 62. c. (4.)

(b) Burr. 2690.

[1] Vide Page 188 ante, note [1.]

on a promise made the 1st May, 3 Car. I: for money lent: and after verdict, it was moved in arrest of judgment, for that it appeared by the declaration, that the cause of action did arise above six years before the action brought. But by the court judgment was given for the plaintiff: for, though the cause of action appeared to be twenty years before the action brought, yet the plaintiff shall recover, if the defendant does not plead the statute; which was made for the ease of those who would take advantage thereof; but the court shall not give the defendant advantage thereof, if he will not plead it.(a)[1]

(a) 1 Lev. 110.

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[1] In all cases, the Statute of Limitations must be pleaded. *Brand. vs. Longstreet, (In Error)* 1 *South. Rep.* 325. *Brown vs. Jones & Al.* 2 *Gallis. Rep.* 477.

The COURT OF APPEALS of *Maryland*, in *Maddox vs. The State*, for the use of *Swann*, at December Term, 1819, decided, that the Act of Limitations, if relied on, must be pleaded: *Merryman & Al. vs. The State*, &c. 5 *Herr. & Johns. Rep.* 425, in note.

In order to form a Bar, the Statute of Limitations ought to be specially pleaded; or at least insisted on particularly, so that the plaintiff may show in his *Replication*, any fact to avoid the bar. *Hudson vs. Hudson's Admr. & Al.* 6 *Munf. Rep.* 352.

Under the General Issue, in *Assumpsit*, the defendant cannot give in evidence, the Statute of Limitations; but if he would avail himself of it, he must plead it specially. *Robins vs. Harvey*, 5 *Conn. Rep.* 335. & *Vide Taylor's Admx. vs. Richards & Co.*, 3 *Munf. Rep.* 8.

The respondent in the Admiralty Court cannot avail himself of the Statute of Limitations, unless he plead it. *Brown vs. Jones & Al.* 2 *Gallis. Rep.* 477.

In the case of *Maddox vs. The State*, use of *Swann & Al.* 4 *Herr. & Johns. Rep.* 539, 541.) CHASE, Ch. J. delivering the Opinion of the Court, said, "It has been established, that in order to take advantage of the Act of Limitations. it must be pleaded."

But this reason, though admitted to be true as a proposition, at law has been denied to be satisfactory : and the true ground

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A party who relies on *Prescription*, must plead it. *Dunbar vs. Nichols*, 10 *Mart. Rep.* 184.

*Prescription* is presumed to be *waived*, when not pleaded. *Brown & Al. vs. Duplantier*, 1 *Mart. Rep.* (N. S.) 312.

The Statute of Limitations cannot be taken advantage of in *Replevin*, unless pleaded. *Smith vs. Williamson*, 1 *Har. & Johns. Rep.* 147.

It cannot be given in evidence under the plea of *not guilty*, in an action of *Slander*. *Brand vs. Longstreet*, (*In Error*), 1 *South. Rep.* 325.

But the Act of Limitations need not be pleaded *separately* to each distinct count in a declaration containing several counts upon several distinct causes of action ; a General Plea to the whole declaration is sufficient. *Bullen's Admr. vs. Rigdley's Ex'or.* 1 *Har. & Johns. Rep.* 104.

"The Statute of Limitations must either be pleaded or insisted on by the answer, to entitle the party to the benefit of it, though the court will often, in cases of state demands, take the time in the Statute as a guide to its discretion. (*Prince vs. Heylin*, 1 *Atk.* 493:)" *Dey vs. Dunham*, 2 *Johns. Ch. Rep.* 191. (PER KENT, Ch.)

A plea in bar, of the Statute of Limitations is bad, unless accompanied by an answer supporting it, by a particular denial of all the facts and circumstances charged in the bill, and which in Equity may avoid the Statute. *Goodrich, Admr. &c. vs. Pendleton*, 3 *Johns. Ch. Rep.* 384.

To a bill for an account, stating that no demand was made upon the defendants for twelve years ; the defendant demurred generally, relying upon the Statute of Limitations, and the fact appearing on the face of the bill, that the Statute ran against the demand, the demurrer was allowed, and leave to amend was refused. *Foster vs. Hodgson*, 19 *Ves. Rep.* 181, 186.

Adverse possession for more than three years, of a Slave, is a good defence at law ; and it is no answer to this objection that the defendant has not pleaded the Statute. *Bell vs. Beemen & Al.* (*In Equity*), 3 *Murph. Rep.* 273.

CH. 10.]      *Of Pleading the Statute.*

of distinction between this statute and the statute of 31 Eliz.

A plea of the Statute of Limitations will not be received unless put in, in due time; nor be permitted to be amended, if pleaded defectively. *Lamott vs. M'Laughlin*, 3 Harr. & M'Hen. Rep. 324. & Vide, *Perkins vs. Ex'ors. of Perkins*, 1 Harr. & M'Hen. Rep. 400.

A plea of the Statute of Limitations is never allowed to be added after issue joined. *Hallagan ads. Golden*, 1 Wend. Rep. 302.

Where the defendant has already pleaded, he will not be permitted to add the plea of the Statute of Limitations. *Cox vs. Rolt*, 2 Wils. Rep. 253.

Nor to withdraw a plea of payment and substitute the plea of the Statute of Limitations. The Court said; "It has often been held, that a plea of the Statute of Limitations will not be received, as matter of favor, by way of Amendment, after the period of pleading it as matter of right has elapsed. It must be pleaded in the first instance. 1 Archb. Pr. 124, 2 Wils. 253." *Coit vs. Skinner*, 7 Cow. Rep. 401.

Upon motion, on affidavit of merits, &c., to set aside an inquest regularly taken at the Circuit; The Court set aside the inquest, upon payment of costs thereof, together with the costs of resisting the motion; and imposed on the defendant, as a condition, that he should withdraw his plea of the Statute of Limitations; in analogy, as it is stated, to the practice of opening a default and permitting a defendant to plead. *Fox vs. Baker*, 2 Wend. Rep. 244.

In the case of *Brown vs. Sutter*, (1 Dall. Rep. 239.) SHIPPEN, PRESIDENT, said; "The Court would never open a regular judgment, to let in a plea of the Statute of Limitations."

The Court will not after a regular judgment interfere to give a defendant an opportunity of pleading the Statute of Limitations upon a general affidavit of defence, but if he will upon oath, declare the nature of his defence, and swear that the sum claimed was actually paid, or in any way settled and accounted for, they will not restrict him from pleading the Statute. *Dutilh. vs. Miller*, 2 Brown's Rep. 311.

And where the Statute of Limitations had been informally pleaded, and judgment given, on special demurrer, for the plaintiff; the Court granted the defendant leave to amend his plea,

and other statutes limiting penal actions to a definite period, is

and plead the Statute of Limitations again in proper form, upon payment of costs; his counsel stating that he had been misled by some of the precedents. *Dyster vs. Battye & Al.*, 3 *Barnew. & Ald. Rep.* 453.

Where the plaintiff amends his declaration, the defendant may plead the Statute of Limitations after the amendment, if he will waive his former plea. *Green vs. Gill, Ex'or.* 5 *Mass. Rep.* 379.

A plea of the Statute of Limitations was allowed to be added to the plea of the General Issue in an action of trespass for *mense profits*. *Peaceable vs. Whitehill & Al.*, 2 *Yeates' Rep.* 279.

And the like was allowed, in favour of an administrator, in an action of *Assumpsit*. *Tomlin's Admr. vs. How's Admr.* 1 *Virg. Rep. (Gilm.)* 1.

So in *debt*, against administrators. *Reid vs. Admrs. of Hester, Cam. & Norw. Rep.* 488.

After Issue joined and the cause set down for hearing, the defendant in Chancery may be permitted for *good cause shewn*, to amend his answer, and to plead the Statutes of Frauds and Limitations. *Jackson's Assignees vs. Catright & Al.*, 5 *Munf. Rep.* 308.

After a plea of the Statute of Limitations to a bill for an account and discovery, has been, together with an accompanying answer over-ruled, and the defendant ordered to put in a full and perfect answer, he will not be allowed to repeat in his second answer, the same matter contained in the plea which had been over-ruled, though he add matter in his second answer sufficient to sustain the defence upon the Statute; but he must put in a full and perfect answer. *Murrays vs. Coster & Al. (In Error.)* 4 *Cowen's Rep.* 617. *Coster & Al. vs. Murrays*, 7 *Johns. Ch. Rep.* 167.

In the case of *M. Clare, late Sheriff, &c. vs. Erwin & Al.* (3 *Cow. Rep.* 313.) the defendants were sued as sureties on a bond given by the gaoler to the plaintiff as Sheriff, &c. The declaration among other things stated that a prisoner had been committed to gaol on a *Ca. Sa.*, and that the gaoler had negligently suffered him to escape; and that a suit had been brought, and a judgment recovered, against the said plaintiff in consequence of said escape. Plea, that the said Sheriff was not sued within one year from the time of the said escape, and that he neglected to avail himself of the Limitation of the Statute in that behalf; and, that therefore, the said judgment was recovered against the said Sheriff in his



supposed to be, because the statute 21 Jac. I. c. 16. limits those

own wrong and by his own default, and concluded with a verification. Demurrer and Joinder in Demurrer; *Held*, that this Plea was good in form but bad in substance, and that it was no defence to the present suit that the Sheriff had neglected in the suit against him for the escape to avail himself of the Limitation of the Statute.

Though length of time may be an equitable bar, in analogy to the Statute of Limitations, to a bill to redeem; yet the respondent cannot take advantage of it on demurrer, but must insist on it by his answer, in order to give the petitioner an opportunity to shew, on the hearing, that he is within the savings of the Statute. *Bulkley vs. Bulkley*, 2 Day's Rep. 363.

Corporations, as well as private persons, may plead the Statute of Limitations. *Kanes vs. Bloodgood & Al.*, 7 Johns. Ch. Rep. 129.

The defendant to an attachment in Chancery in Virginia, may plead the Statute of Limitations without answer. *Wilson vs. Koontz*, 7 Cranch's Rep. 202.

"A declaration need not set forth the circumstances which take the case out of the Statute of Limitations." (Per MARSHALL, CH. J.) *Mandeville & Al. vs. Wilson*, 5 Cranch's Rep. 18.

In an action of debt on a foreign judgment stating the foundation of the judgment to be a specialty, the Statute of Limitations is not a good plea. *Richards, Adm'r. &c. vs. Bickley, Adm'r. &c.* 13 Serg. & R. Rep. 395.

A plea of the Statute of Limitations of the state, where the contract is made, is no bar to a suit brought in a foreign tribunal to enforce that contract. But a plea of the Statute of Limitations of the state, where the suit is brought, is a good bar. *Le Roy & Al. vs. Crowninshield*, 2 Mason Rep. 151. & *Vide Pearsall & Al. vs. Dwight & Al.*, 2 Mass. Rep. 84. *Ruggles vs. Keeler*, 3 Johns Rep. 263. & *Vide Atwater's Adm'r. vs. Townsend*, 4 Conn. Rep. 47. *Medbury vs. Hopkins*, 3 Conn. Rep. 472. *Hull vs. Minor*, 2 Root's Rep. 223. *Nash vs. Tupper*, 1 Caines' Rep. 402.

If an admission, sufficient to take a case out of the Statute of Limitations be made to an executor or administrator, there needs no special count to be made in such case, although the English

actions where a debt, or other cause of action, is already vested in

practice is contrary. *Baxter, Adm'r. vs. Penniman*, 8 Mass. Rep. 133.

In the case of *Penniman vs. Vinton & Al. Adm'rs. &c.* (4 Mass. Rep. 276, 277.) the plaintiff brought an action of *Assumpsit* to recover part of a debt which he had paid as surety in a bond for the intestate; the defendants pleaded *non assumpsit infra sex annos*; & *actio non accrevit infra sex annos*. These pleas were traversed, and on the traverse, issues were joined. PARSONS, CH. J., in delivering the Opinion of the Court, said; "We cannot distinguish this case in principle from a case, where the action may be brought by a surety in a promissory note against the principal, for not indemnifying him against the payment of the note. In such a case it is not denied that the Statute of Limitations would be a good plea, because, as it is said, the action is not founded on a bond. In the present case the action is not founded on a bond, but on a promise or simple contract (although the executing of the bond as a surety is the consideration of the promise); and the breach of the promise is the not indemnifying the plaintiff against the payment of the bond, and is not the non-performance of any contract, to which the principal was bound by deed to the surety."

In case prescription is pleaded to a right of passage, the party against whom it is offered must give evidence of those acts which will take his case out of it. *Powers vs. Foucher*, 12 Mart. Rep. 70.

To a Plea of *non assumpsit infra sex annos*, the plaintiff replied that when the cause of action accrued, the defendant was out of the state; and did not return till within six years before the commencement of the action, and left no property, &c. The defendant rejoins, that he never was an inhabitant of or resident in the State, but in *Connecticut*, where the promise was made, until he came into the state as alleged in the replication. Upon a demurrer to the rejoinder, the plaintiff had judgment. *Dwight, Adm'r. vs. Clark*, 7 Mass. Rep. 515.

Under the general issue in a writ of entry, it is not competent for the tenant to give in evidence a deed from the demandant or his ancestor, made after the disseizin committed to a stranger. If the tenant in such case plead such deed in bar, the demandant may reply, that nothing passed by the deed, which may be traversed, and upon issue joined and found for the demandant, he shall have judgment. *Wolcot & Al. vs. Knight & Al.*, 6 Mass. Rep. 418.

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the plaintiff by means of some contract, or other transaction, be-

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In the case of *Eames vs. Savage, Admr. &c.* (14 Mass. Rep. 425,) the Plaintiff brought *Assumpsit* for money had and received, &c. by the Intestate; Pleas, Statute of Limitations; Replications, that Plaintiff paid money to the Intestate, as a consideration for land, which the Intestate promised to convey to the Plaintiff, and of which he put the Plaintiff into possession, but that he never made such conveyance; and that the Plaintiff had been evicted by persons claiming under the Intestate within the time of Limitation, and that the consideration thereby, failed. Demurrer and joinder in Demurrer.—The replications were adjudged bad, because the Plaintiffs should have joined the issues on the pleas.

In *Massachusetts*, under the provision of the Statute of 1783, c. 42. §7. a Defendant in an action before a Justice of the Peace, may avail himself of the Statute of Limitations under the general issue: the words "*justification, or excuse*" in the Statute, meaning every matter which may bar the Plaintiff's right to recover; whether requiring a special plea by the common law, or not. *Williams & Al. vs. Root, (In Error,)* 14 Mass. Rep. 273.

If there be any thing in the Plaintiff's case, which entitles him to an exemption from the operation of the Act of Limitations, he ought, when the Act is pleaded, to set it forth in his replication. If he omit to do so, and join issue on the plea, it is incumbent on him to prove an assumption within six years. *Witherup vs. HM, 9 Serg. & R. Rep.* 11.

To a plea of the Statute of Limitations, in an action on sundry promises, the Plaintiff replied, that at the time of making the promises the parties were in parts beyond seas; and that he the Plaintiff, was never afterwards within the *United States* at the same time the Defendant was also within the same, or had any property subject to attachment by the ordinary process of law, until within six years before the commencement of the action. The replication was adjudged bad, and the Defendant had judgment. *Vans vs. Higginson, 10 Mass. Rep.* 29.

To a plea of the Statute of Limitations in an action to recover back money paid, it is a good replication, that the money was paid in consequence of a fraudulent concealment on the part of the Defendant, and that the Plaintiff did not discover the fraud until within six years before the commencement of the action. *Welles, Exor. &c. vs. Fish & Al. 3 Picker. Rep.* 74. *Homer vs. Fish & Al. 1 Picker. Rep.* 435.

A party entitled to the benefit of the proviso in favor of persons

tween the plaintiff and defendant, prior to the bringing of the ac-

beyond seas, loses his privilege from the time he comes into the state; and a replication to a plea of the Act of Limitations, not stating that the Defendant had been in the state within the time allowed by the Act, is bad on Demurrer. *Thurston & Al. vs. Fisher, Admr. &c.* 9 *Serg. & R. Rep.* 288.

To an action of assumpsit on a promissory note, due four years before Defendant petitioned for and obtained the benefit of the Insolvent Debtor's Act, he pleaded the Statute of Limitations; *Replication*, That under a proviso of the Insolvent Debtor's Act, all persons who took the benefit of said Act, *were incapacitated ever afterwards to plead the Statute of Limitations, in bar, to any action that might be afterwards brought against them for any demand or cause of action that existed at the time of exhibiting their petitions.* (2 *Brev. Dig.* 154.) P. L. 251. CHEVES, J. who delivered the Opinion of the Court, said; "The reason and object of the law do not apply to the case of the Plaintiffs, who had forborne to sue until their claim was barred by the Statute, before the Defendant petitioned for the benefit of the Act." And the plea was sustained. *Wilson & Al. vs. Ramsay*, 1 *Nott & M C. Rep.* 109.

A plea of the Act of Limitations, in bar of a *Scire Facias*, to revive a judgment, cannot be repelled by a replication that the Defendant within five years next before the suing out of the *Scire Facias*, promised to pay the amount of the judgment. *Day, Exor. &c. vs. Pickett*, 4 *Munf. Rep.* 104.

In the case of *Blood vs. Darrah, Admx.* (1 *New Hamp. Rep. [R. & W.]* 215,) which was an action of *Assumpsit*, the Defendant pleaded, *actio non accrevit infra sex annos*; to which plea there was a general Demurrer; the COURT said; "The Demurrer in this case is not well taken. The plea is in law sufficient to bar the action. If the intestate was at the time of his decease liable to an action upon these notes, and this action was commenced within two years from the time when the Defendant took out letters of administration, that matter ought to have been specially replied to the plea."

To an action of *assumpsit*, the Defendant pleaded, 1st, *non assumpsit*; 2nd, *non assumpsit within five years*. On the first plea, issue was joined; to the second, the Plaintiff replied, that before the expiration of five years from the time of his making the promise alleged in the declaration, the Defendant removed himself out of the county of N., where he resided when the cause of ac-

tion : but in penal actions, the duty or right of action attaches in

tion accrued. The Defendant rejoined ; That he did not by his removal from the county of N., prevent the Plaintiff from bringing and maintaining his action within five years next after the supposed accrual of the cause of action. *Held*, That the replication was fatally defective, and insufficient "to bring the case within the influence of the 9th Section of the Act of Limitations." *BOYLE, CH. J. delivering the Opinion of the Court*, said ; "As the replication of the Plaintiff in this case alleges only the fact of removal, without alleging that he was thereby defeated or obstructed from bringing his action, it is plainly no sufficient answer to the plea." *Sneed vs. Hall*, 2 *Marsh. Rep.* (Ky.) 21. & *Vide Wilson vs. Koontz*, 7 *Cranch's Rep.* 202.

Debt upon *Bond*, dated 28th of September, 1694. Writ issued to August, 1722. The Defendant pleaded the Act of Limitations. *General Demurrer* to the plea, and Joinder ; Judgment for the Plaintiff. *Lady Baltimore, Executrix, &c. vs. Evans' Executrix, &c.* 4 *Har. & M'Hen. Rep.* 482. & *Vide Gough vs. Ridgely's Exors.* 3 *Har. & M'Hen. Rep.* 99.

Debt upon *Bond*, dated the 20th of November, 1771. Original Writ issued 16th February, 1795. The Defendant pleaded the Act of Limitations ; the Plaintiff demurred generally ; and the Defendant joined in Demurrer. The General Court overruled the Demurrer, and gave judgment for the Defendant. *Wootton's Executor vs. Sprigg's Executor*, 4 *Har. & M'Hen. Rep.* 852.

To a plea of *non assumpsit infra sex annos*, the Plaintiffs replied, that within six years after the cause of action accrued, to wit : on the 6th July, 1826, they sued out process, &c., and that the Defendant promised within six years next before that day. *Rejoinder*, that the Plaintiffs did not within six years next after the cause of action accrued, sue out the process, &c. ; and that the Defendant did not promise within six years next before the issuing of the process. *Held*, on demurrer, that the rejoinder was bad in substance, in not denying the material fact that the process issued at the time stated ; but tendering an immaterial issue as to the time of issuing the process. *Held*, also, that the rejoinder was bad as being inconsistent. A pleading bad in part, is insufficient for the whole. *Satterlees vs. Sicrling*, 8 *Cowen's Rep.* 233.

An information for an offence, by reason whereof a forfeiture belongs to the Treasury of the State, was presented to a justice of the peace, and a warrant issued thereon, in August, 1815, the offence having been committed in September, 1814 ; in May, 1816, the defendant was arrested : at the Superior Court the defendant plead-

the plaintiff merely by bringing the action, and did not exist in

ed that the information was not exhibited within one year after the offence was committed. *Replication*; That an information was, within one year, exhibited by the state's attorney to a Justice of the Peace having cognizance of the offence: on demurrer to this Replication, the plea was held bad; and that the offence was not barred by the Statute of Limitations, although the offender was not arrested, examined or tried, until after the expiration of the year. *Newell vs. The State of Connecticut*, 2 Conn. Rep. 38.

The limitation of six months, to suits against Justices of the Peace, contained in the 7th section of the act of 21st March, 1772, [Pennsylvania] may be taken advantage of by the Justice, though not specially pleaded. *Prather vs. Connelly*, (In Error) 9 Serg. & R. Rep. 14.

A declaration in *Assumpsit* against an administratrix contained sundry counts, on promises made by the defendant's intestate, and a count stating that "the said *Margery Dixon*, administratrix as aforesaid, after the death of the intestate, accounted with the plaintiff concerning divers sums of money due and owing from the intestate, and that upon such account the intestate was found indebted to the plaintiff in the sum of, &c. and that the said *Margery*, in consideration thereof, promised the plaintiff to pay him the said sum of money. The defendant pleaded, that neither the intestate, nor herself, assumed in manner and form as the plaintiff had declared; and further pleaded, *Non assumpsit infra tres annos*, and *Actio non accrevit infra tres annos*, on which issues were joined. On the trial the plaintiff, to avoid the bar of the Act of Limitations, set up by the defendant in her *second* and *third* pleas, proved that the plaintiff and defendant had agreed to refer the claim of the former to arbitration; and that when his account was presented to the defendant immediately preceding the institution of the suit, she said, she did not wish to see it; that she would pay all just claims against the estate of the deceased as soon as she obtained money, &c. *DORSEY, J. who delivered the Opinion of the Court*, after deciding that the defendant's declarations of her willingness to pay, &c. were, *in themselves*, sufficient to take the case out of the Statute, said; "The next question is, what is the effect of those declarations with reference to the pleadings in the case? The *five* first counts are founded on assumptions made by the intestate to the plaintiff; under neither of those counts was the said testimony admissible to defeat the defendant's pleas of limitations. *Sarell vs. Wine*, 3 East, 408. *Secar vs. Atkinson*, 1 H. Bl. Rep. 102. 1 *Chitty's Plead.* 204, 205. 2 *Saunders*, 63. (note 6.)"

him before; and unless he brings his action within the time pre-

"Upon an examination of the *sixth* count it will be found, that "the assumption therein stated is made by the defendant *in proprio jure*, and not as administratrix. The count does not state that "the defendant, as administratrix, promised to pay the balance "found due on the accounting, but avers the assumption to be "made by her, without any reference to her representative character. The words are, "that the said *Margery*, in consideration thereof, promised to pay." True it is that the count commences by saying, "that the said *Margery*, administratrix aforesaid, accounted with the said *Samuel Chapman*;" but this does "not amount to an averment that she accounted as administratrix; "and even if it did, there are no words of reference by which her "promise to pay could be construed into a promise to pay in *autre droit*. The case of *Henshall vs. Roberts*, 5 Eas., 150, is full to "this point.

"In this view of the case there is no averment in the record of "any promise made by the defendant as administratrix, and therefore her declarations, according to the authorities herein before "referred to, could not disprove her *second* and *third* pleas.

"If the *last* count would, when standing alone, be sufficient to "charge the defendant personally, its association in the case with "the other counts, taints the whole proceeding, by occasioning a "misjoinder in action. But I am clear in the opinion that the last "count, whether standing alone or in association with others, is "essentially erroneous; as it states no promise or assumption by "the intestate, or by the defendant as administratrix, it cannot "charge the defendant as administratrix. It cannot charge the "defendant personally, because no legal consideration is shown to "support her promise. If she was indebted in one right, and promised to pay in another right, from this promise she derived no "advantage or convenience, and therefore the demand cannot be "supported against her in her personal capacity. *Mitchinson vs. Hewson*, 7 T. R. 344." *Chapman vs. Dixon's Adm'r*, 4 Harr. & Johns. Rep. 527, 530.

In the case of *The State, use Millard & Waring vs. Green*, (*On Appeal*, 4 Harr. & Johns. Rep. 542,) the pleadings are stated in the *Opinion of the Court*, delivered by DORSEY, J. as follows: "This was an action brought on an administration bond for the "use of *Millard and Waring*, against the defendant, who was one "of the securities of *Henry Stewart*, the administrator of *Joshua Stewart*. The declaration is in the common form. The defendant pleaded performance. The State replied, that the Intestate in his life-time being indebted to *Millard and Waring* in the "sum of £15 18 10, for goods sold and delivered by them, promised to pay them that sum, and that neither the intestate, nor

scribed, there is no right of action attached in him; therefore, he seems as much bound to prove the commencement of his action \*within time, which is the cause or [\*209] consideration of it, in order to entitle himself to a verdict, as a person who brings *assumpsit* or debt for goods sold and delivered, or money lent, and the like, is to show the cause or consideration of his action to entitle him to a verdict; and if he fail therein, it appears that he has no cause of action. But the statute of limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy; so that a promise within six years, without any other consideration, is sufficient to revive the action;

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“the administrator, although assets had come to his hands sufficient to pay all the debts of the intestate, had paid the said sum. The defendant rejoined that the intestate, in his life time, did not assume in manner and form as the State had by replying alleged; on which issue was joined. The defendant then proceeds as follow: ‘And the said defendant, with leave of the Court here first had and obtained, further saith, that the state ought not, &c. because he saith that the said *Joshua* in his life-time did not, within three years next before the day of impetrating of the original writ in this cause, promise in manner and form as the said State had by replying alleged, and of this he puts himself upon the country.’ The State demurred to this second rejoinder. The defendant joined in demurrer, and the Court below overruled the same.”

“Two objections have been urged by the appellant’s counsel. First, That the defendant cannot, under the statute of *Anne*, rejoin double to a replication. Secondly, That the rejoinder in this case, if good in other respects, is defective, because it tends an issue instead of concluding with a verification.

“It is unnecessary for the court to decide in this case, whether a defendant, in an action on a bond with a collateral condition, can rejoin double to the replication assigning the breaches. Assuming for the sake of argument that the statute of *Anne* does not permit a defendant in such a case to rejoin a double defence to the breach assigned, the infirmity would consist in duplicity alone, which can only be taken advantage of by special demurrer. You must, according to the authorities, lay your finger on the defect. The objection to the want of verification is open to the same answer; it must be assigned as special cause of demurrer.”

JUDGMENT AFFIRMED.



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therefore, if he will take advantage of that circumstance, it is necessary he should plead the statute.(a)

In the king's bench 23 & 24 Car. II. the declaration was on a promise seven years before, to pay money within three months after: yet, because the defendant had not pleaded the statute, he could not have advantage of it.(b)

So, in error of a judgment in the common pleas, in *assumpsit*: and the first error assigned was, that it appeared upon the declaration, that the cause of action accrued more than six years before, &c. and therefore it was not necessary to plead the statute. *Sed non allocatur*: for the statute in this case, as well as in all others, ought to be pleaded; for it might be, that the original was sued within six years after the cause of action; and therefore the defendant shall plead the statute, to the end that the plaintiff may have an opportunity to reply to such matter.(c)

[\*210] \*But, at first, it was not considered necessary for the defendant to plead the statute; for in Trinity term, 4 Car. I. in *assumpsit*, after verdict given for the plaintiff, it was moved in arrest of judgment, that the promise was alleged to be made beyond the time limited in the statute of limitations, and the action was not brought within the time limited thereby.

All the court held, that if it appear so by the plaintiff's own showing, that the action is not brought within the time limited by the statute, the plaintiff cannot maintain his action, but judgment shall be given against him:[1] or, if the contract in the

(a) 2 Saund. 68. a. note 2.

(b) 1 Vent. 191.

(c) 2 Ld. Raym. 838.

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[1] It is not necessary to *plead* the Act of Limitations against a Bill of Review; for it ought to appear, in the bill itself, that it is exhibited within the time prescribed by law; or that the complainant is protected by some of the savings in the act; otherwise it ought not to be received. *Shepherd vs. Larue*; and, *Nephy vs. Kinchloe*, 6 Munf. Rep. 529.

*assumpsit* or debt be alleged to be within the time limited by the statute ; and, upon *non debet* or *non assumpsit* pleaded, it appears upon the evidence, that the *assumpsit* or contract was beyond the time limited, the action lies not, and the defendant shall take advantage thereof, if it be specially found by the jury ; for the statute is in the negative, " that he shall not maintain such an action but within the time limited by the statute."

But in the principal case it appeared, upon the view of the record, that the action was brought within the time limited ; and therefore it was adjudged for the plaintiff. This was in the common pleas.(a)

But the court of king's bench always inclined, and finally settled, that no advantage could be taken of the statute unless it was pleaded.

\*And in an action of *assumpsit* by the executrix of [ \*211 ] an attorney of the common pleas for fees and expenses, the defendant pleaded *non assumpsit*, which was found against him. And on a writ of error brought, an exception was taken, because the promise was upon the 18th day of July, 1621, and the breach assigned for not paying upon request was in September, 1621 ; and the action was brought in the common pleas in Michaelmas term, 3 Car. I. and so above six years after the promise and breach ; and then, by the statute of limitations, he ought not to maintain that action. But because it was not pleaded, though the declaration was in Michaelmas, 3 Car. I. the original writ not being certified, nor appearing when it was sued out, the court did not much regard it ; and thereupon the judgment was affirmed.(b)

But in the following term, in the king's bench, on the same point, the court was equally divided.

(a) Cro. Car. 115.

(b) Cro. Car. 150.

*Assumpsit* against an administrator, upon a promise by the intestate; supposing that the intestate borrowed of the plaintiff upon the 1st day of May, 12 Jac. I. twenty pounds, and in consideration thereof promised to repay it him on request; and that the plaintiff, upon the 1st August, 12 Jac. I. requested the payment, and he had not paid it; and that the intestate died, and administration was committed to defendant, who, upon request, had not paid it, although he had assets. Upon *non assumpsit* pleaded, the verdict was found for the plaintiff.

[\*212] \*It was moved in arrest of judgment, that this *assumpsit* being made 12 Jac. I. and the breach in the same year, this action is brought too long after; for, by the statute of limitations, it should be brought within six years.

Jones and Whitelock, Js. conceived the defendant ought not to take advantage of this statute, unless he had pleaded it, or had demurred thereupon, because the statute hath divers exceptions; so that if it be brought after the time, if the plaintiff were an infant, or *feme covert*, &c. it were well enough.

But Hyde, Ch. J. and Croke, J. conceived, forasmuch as it appeared, by the plaintiff's own showing in his declaration, that it was out of the limitation of the statute, and the statute is in the negative, "that it shall not be brought at all," unless it be brought within the time limited by the statute; therefore, the defendant should have advantage thereof by exception, without pleading.

Whereupon the court would further advise.(a)

The same objection was taken five years after, in arrest of judgment; and the court of king's bench then ruled, that the statute of limitations must be pleaded, and cannot be taken advantage of on motion.

(a) Cro. Car. 163.

Action for words, and declares they were spoken 2 Car. I.; the defendant pleaded not guilty, and it was found against him. It was moved in arrest of judgment, that the action was brought for words spoken six years before the action commenced; so that by the statute of limitations he was [ \*213 ] barred of this action; and therefore the court ought not to give judgment upon this verdict for the plaintiff.

Jones and Berkeley, Js. held, that the plaintiff ought to have judgment; because the defendant had not pleaded the statute: for there might be divers causes that he could not bring the action before that time, viz. that he was in prison, or within age, or beyond seas, or that he had sued the defendant to outlawry, and the defendant had reversed the outlawry, and this action brought within a year after the reversing the outlawry; (as in truth the case was;) for then the action was well brought.

But it was moved, that he should have then shown it in his declaration.

It was adjudged for the plaintiff.(a)

So, in an action for words, the declaration stated the speaking to be on the 20th September, 7 Car. I. whereupon the plaintiff brought his action in the king's bench, in Michaelmas term, 10 Car. I. the defendant pleaded not guilty, and found against him.

And it was moved in arrest of judgment, that these words being spoken 20th September, 7 Car. I. and the action being brought in Michaelmas term, 10 Car. I. (whereas it ought to be brought within two years by the statute of limitations) by his own showing, it is brought for words spoken above two years, and therefore he is to be barred of this action.

(a) Cro. Car. 881.

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[ \*214 ]      \*But because he had admitted the action, and had not pleaded the statute of limitations, but not guilty—

Jones and Berkeley, Js. held, that he should not then have advantage thereof.

And Jones said, he knew it had been so ruled twice in the time of the Lord Lea, Ch. J. and in the time of Sir Randall Crew, Ch. J.; for otherwise there would be a mischief in this court more than in another court, viz. in the common pleas, where they prosecute by original and outlawry; and the outlawry be reversed, the statute aids the plaintiff. But here they proceed by *latitat*, whereby the cause of action doth not appear, and may, peradventure, divers years continue by process, before the defendant be arrested, and the plaintiff, in his declaration, needs not show the cause wherefore he did not commence his suit sooner: for if he should do so, the declaration would be more prolix than was convenient. But if the defendant pleads the statute of limitations, then the plaintiff, by the replication, ought to show good cause why he did not bring his action within the time limited by the statute, otherwise he is to be barred: for the statute allows of many impediments, viz. infancy, imprisonment, *ouster le mer*, and others therein mentioned, which shall be sufficient causes that the action was not brought sooner.

But Croke, J. doubted thereof, because, by his own showing, it appeared that the action was not brought within the time limited by the statute, and the statute is in the negative, [ \*215 ] "that it shall not be brought but within \*the time;" so the court, *ex officio*, ought to abate it, unless he had shown wherefore it was not brought within the time.

But by the opinion of the other justices, it was adjudged for

the plaintiff, unless other cause, &c.(a) which seems to have settled the question.

But a distinction has been taken with respect to pleading the statute in debt: for by Holt, Ch. J. in the case of *Draper v. Glassop*,(b) if the defendant plead *non assumptit*, he cannot give in evidence the statute of limitations, because the *assumptit* goes to the *præter tenses*; but upon *nil debet* pleaded, the statute is good evidence, because the issue is joined *per verba de præsentis*, and without doubt, *nil debet* by virtue of the statute;[1] and it is no debt at this time, though it was a debt. The modern practice, however, is, to plead the statute in one action as well as the other.

(a) Cro: Car. 404.

(b) 1 Ld. Raym. 155.

[1] Whether the Statute of Limitations can be given in evidence, on *nil debet*? *Quære. Lando vs. Gardner*, 1 *Cranck's Rep.* 343.

The defendant in *detinue* may protect himself on the plea of *non detinet*, (without pleading the Act of Limitations,) by proving that he, and those under whom he claims, had been in possession of the property in controversy more than five years before the emanation of the writ. *Elam vs. Bass' Ex'ors.* 4 *Munf. Rep.* 301.

Issues being joined on the pleas of *non detinet*, and the Act of Limitations; a verdict "that the defendant doth detain the slaves, "in manner and form," &c. is sufficiently responsive to both issues. *Boatright vs. Meggs.* 4 *Munf. Rep.* 145.

After verdict for the plaintiff, on the plea of *nil debet*, it is no ground for arresting judgment, that the claim, as shown by the declaration, was barred by the Act of Limitations; for it will be intended that, if the act were given in evidence, the plaintiff rebutted it by some other evidence which avoided its operation. *Murdock & Al. vs. Herndon's Ex'ors.*, 4 *Hen. & Munf. Rep.* 290.

Under the plea of *nil debet* to an action of debt on a penal Statute, the Statute of Limitations may be given in evidence. *Watson vs. Anderson*, *Harlin's Rep.* 458.

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The plea of *non assumpsit infra sex annos* is insufficient in many cases; for if the cause of action accrues within six years it is immaterial when the promise was made.[2]

In *assumpsit*, the declaration stated, that the defendant was a merchant, and transmitted several goods beyond sea; and promised the plaintiff, that if he would give him so much money, he would pay him so much out of the proceed of such a parcel of goods as he was to receive from beyond sea. The defendant pleaded the statute of limitations, and did not say *non assumpsit infra sex* [\*216] *\*annos*, but that "the cause of action did not arise within six years." The plaintiff demurred, because the cause was between merchants, &c. The whole court held the statute to be well pleaded, and Jones, J. said, The defendant has pleaded well in saying, that "the cause of action did not arise within six years;" for the cause of action ariseth from the ship coming into port, and the six years are to be reckoned from that time.(a)

In the case of *Puckle v. Moor*,(b) the declaration was on a promise made seven years before to pay money three months after; and the defendant pleaded *non assumpsit infra sex annos*, whereas it ought to have been, *non accrevit infra sex annos*.

(a) 1 Mod. 71.

(b) 1 Vent. 191.

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[2] *Non Assumpsit infra sex annos*, to a declaration on a promise of indemnity, is bad in substance; and though issue be taken thereon, and there be a verdict found for the plaintiff subject to the opinion of the Court, and the evidence be plainly against the plaintiff upon the issue; if the cause be in other respects with him, he shall have judgment; and although such an issue be found for the defendant, the plaintiff shall have judgment *non obstante veredicto*. *Hale vs. Andrus*, 6 Cowen's Rep. 225.

The Plea of *Non Assumpsit infra quinque annos*, is in many cases insufficient; it is good only where in fact the cause of action did accrue within five years. *Banks vs. Coyle*, 2 Marsh. Rep. (Ky.) 564.

So, in an action upon the case, upon a promise to pay three months after, to which the defendant pleaded *non assumpsit infra sex annos* ; it was urged, that as this promise was laid, he ought to have pleaded that the cause of action did not accrue within six years.

Sympson said, *non assumpsit infra sex annos* relates to the time of payment, as well as the promise.

But Hale, Ch. J. said, That cannot be.

Twisden, J. If I promise to do a thing upon request, and the promise were made seven years ago, and the request yesterday, I cannot plead the statute ; but if the request were six years ago ; it must be pleaded \*specially, [\*217] viz. that *causa actionis* was above six years since.(a)

Error upon a judgment of the common pleas in *assumpsit*, where the plaintiff declared, that the defendant, in consideration that the plaintiff would receive A., B., and C. into her house *ut hospites*, and provide for them meat, drink, &c. promised to pay so much money as she should deserve ; and that the plaintiff avers that she received them into her house, but did not say *ut hospites*, and provided meat, drink, &c. The defendant pleaded *non assumpsit infra sex annos*. Upon which the plaintiff demurred ; and judgment in the common pleas for the plaintiff. And it was agreed by all that the plea was ill : for this being an executory collateral promise, the defendant cannot plead *non assumpsit infra sex annos*, but should have pleaded, *causa actionis non accrevit infra sex annos* ; for if the cause of action accrued within the six years, it matters not when the promise was made ; but if it had been *indebitatus assumpsit*, that plea had been good.(b)

So, in an *insimul computasset*, the count upon which the ques-

(a) 1 Mod. 89.

(b) Ld. Raym. 838.



tion arose was, that upon an account taken the 9th of January, the defendant appearing to be indebted to the plaintiff in the sum of 150*l.* promised payment upon the 30th of January. The defendant pleaded *non assumpsit infra sex annos*: to this it was demurred, because the six years are to be computed from the time of the performance, and not of the promise; and therefore this plea might be true, and yet the plaintiff not barred by the statute of limitations; and therefore the plea [ \*218 ] should have been, *actio non accrevit infra sex annos*. And of that opinion was the court.(a)

In Hilary term following there was another case parallel *annibis*.

So, where the plaintiff declared, that the defendant being indebted to the plaintiff *pro operi et labori, &c.* promised him, on the 1st April, to pay him the money upon the 1st May, &c.; the defendant pleaded the statute 21 Jac. I. c. 16. in bar, *non assumpsit infra sex annos*. It was considered that the plea should have been *actio non accrevit*, and not *non assumpsit*.(b)

In an *indebitatus assumpsit*, on a promise to pay on demand, the defendant pleaded *non assumpsit infra sex annos*: the plaintiff demurred, because the plea should have been, that there was no demand within six years, or *non assumpsit infra sex annos* after demand. But the court held, that an *indebitatus assumpsit* shows a debt due at the time of the promise, and therefore the plea good: but if the promise had been of a collateral thing, which would create no debt till demand, it might be otherwise.(c)

Although the statute should take place from the time of making the promise, yet the plea of *actio non accrevit infra sex*

(a) 10 Mod. 104.

(b) 10 Mod. 205.

(c) Bull. N. P. 151.

annos is proper; [1] therefore it has been considered the safest and best way of pleading the statute in all cases of debt on simple contract, or *assumpsit*, to say, that "the said several causes of action in the said declaration mentioned, or any or either of them, did not accrue to the said plaintiff within six years next before the su<sup>ing</sup> forth the original writ, or [ \*219 ] of exhibiting the bill of the said plaintiff.(a)

In an action by the plaintiff, as assignee of the effects of a bankrupt, he declared that the defendant was indebted to the bankrupt, and being so indebted, promised the plaintiff to pay. The defendant pleaded, that the cause of action did not accrue to the bankrupt within six years. And on demurrer it was

(a) 2 Bland. 68. note 6.

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[1] "There are two modes of pleading the Statute of Limitations; the one, that the defendant *did not promise within five years*; and the other, that the *cause of action did not accrue within that time*. The latter is equally applicable to every case, "but the former, which has been adopted in this instance, is in "many cases insufficient." *Banks vs. Coyle*, 2 Marsh. Rep (Ky.) 564. (Per BOYLE, CH. J. delivering the Opinion of the Court.)

To an action of debt on bond, a plea that the bond was not made within sixteen years, is bad under the Statute of Limitations. (Rev. Laws. 411, Sec. 6.) It should be that the *cause of action* did not accrue within sixteen years. *Richmans Adm'rs. &c. vs. Richman's Ex'ors.* 3 Halst. Rep. 55.

"In all actions brought for breaches of promises founded on collateral and executory considerations, the proper plea is that "the cause of action did not accrue within six years; for it is im- "material when the promise was made, if the cause of action in "such cases arose within the limited period." (Per YEATES, J.) *Meade vs. McDowell* (In Error) 5 Binn. Rep. 199.

To a declaration in an action on the case founded in tort, a plea, of *not guilty of the grievances mentioned in the declaration within six years*, is bad upon special demurrer. The plea should be, "that the cause of action did not accrue within six "years next before the commencement of the suit." *Dyster vs. Battye & Al.*, 3 Barnw. & Ald. Rep. 448.

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held ill, because the plea does not answer to the promise laid in the declaration, and it precludes the plaintiff from proving any promise to himself.(a)

By Holt, Ch. J. and the court.—In an action by an assignee of bankrupt by commissioners, on a simple contract, the right way is, to lay the promise to have been to the bankrupt, except there be an express promise, after assignment made, to the assignee. And the way of declaring on a promise to the assignee is very inconvenient, and a means to oust the defendant of the benefit of the statute of limitations: for if the goods were sold five years before the assignment by the bankrupt, and then the debt is assigned, and a year passes, and the assignee declares on a promise to himself, it will not be a good plea to say, that the defendant "*non assumpsit infra sex annos* to the bankrupt," for that does not answer the declaration. And if he plead "*non assumpsit infra sex annos* to the plaintiff," it will be against him: for if there be any promise transferred by the act, it is only upon the assignment; and the intent of the statute was only to transfer the action, and nothing else.

[ \*220 ]      \*Indeed, if after assignment another receive the money, action will lie for the assignee upon a promise to himself; because the receipt of money after assignment is a contract with him; and every contract or agreement, per Holt, Ch. J. is an express promise, not in word, but in deed, which is as strong; and there is no such thing as a promise in law; and that acceptance of a bill of exchange is an express promise to pay it.(b)

In an action brought under the statute 33 Geo. III. c. 5. by the assignees of Arthur Miller, an insolvent debtor, discharged out of the Fleet prison, as endorsee of a bill of exchange, against the drawer, the first count of the declaration stated the

(a) Str. 979.

(b) 6 Mod. 131.

drawing of the bill, the acceptance by the drawee, the endorsement by the payee to Arthur Miller, before the plaintiffs became such assignees, the refusal of payment by the acceptor, and the protest for non-payment by Miller; of all which premises the defendant afterwards, and before the plaintiffs became such assignees, had notice: by reason whereof he became liable to pay to the said Arthur Miller, &c. and being so liable, and the said sum of money afterwards, and when the said Arthur Miller was so discharged as aforesaid, and the said plaintiffs became such assignees as aforesaid, being due and unpaid, the defendant, in consideration thereof, afterwards, and after the plaintiffs became such assignees as aforesaid, promised to pay them the said sum of money, &c. There was also a count stating that the defendant was indebted to the plaintiffs as assignees, for money paid before the plaintiffs became assignees, of Arthur Miller, to the use of the defendant, in consideration of which the defendant promised to pay \*to [ \*221 ] the plaintiffs as assignees, &c. And a similar count, stating the debt to the assignees for money had and received by the defendant, before the plaintiffs became the assignees, to the use of Arthur Miller, and a promise to pay to the plaintiffs as assignees; and the breach was, the non-payment to the plaintiffs as assignees, &c. To which the defendant pleaded, after the general issue, "that the said several causes of action in the said declaration mentioned, and each and every of them, first accrued to the said Arthur Miller, before the plaintiffs became such assignees as in the said declaration is mentioned, (to wit,) at London, &c. And the said defendant further saith, that six years did elapse after the time when the said several causes of action, and each and every of them, first accrued to the said Arthur Miller, and before the day of suing out of the original writ of the said plaintiffs against the said defendant, and this," &c. To which plea there was a general demurrer.

In support of the demurrer, Heywood, Serjeant, argued, that the plea was no answer to the declaration. In all the counts the

promise is stated to have been made to the plaintiffs; and as a breach of promise is the cause of action in *assumpsit*, no cause of action at all could accrue to the insolvent. *Non assumpsit infra sex annos* to a bankrupt, is no plea to *assumpsit* by the assignees. 6 Mod. 131. *Parkins v. Wollaston*. 2 Str. 919. *Skinner v. Rebow*. But if the original debt to the insolvent be taken as the cause of action mentioned in the plea, yet there might have been an express promise to the plaintiff, as stated in the declaration, to which allegation there is no answer in the plea.

[\*222] \*Le Blanc, Serjeant, *contra*, contended, that the demurrer admitted that the cause of action accrued to the insolvent, and more than six years before the action brought; an express promise, therefore, ought not now to be insisted on; when, if the parties had gone to trial, they would have had nothing to rest on but an implied promise, raised on a consideration which is admitted to be within the statute of limitations. If it were allowed the plaintiffs now to insist on an express promise, they would succeed on demurrer by supposing an express promise, and at the trial by supposing an implied one, when, in fact, there was neither, and the defendant clearly entitled to the benefit of the statute. Instead of demurring, they ought to have pleaded an express promise within six years, on which fact the parties might have gone to trial.

Lord Ch. J. Eyre suggested, that the defendant might have pleaded that the debt was first due to the insolvent more than six years before the action was brought, and that he made no promise to the plaintiffs within six years.

Buller, J. seemed to think, that the plaintiffs must prove an express promise at the trial.

Le Blanc then prayed to amend, which, as the defendant had amended once already, was refused.(a)

## Judgment for the plaintiffs.

\*The conclusion of the plea should be with a verification ; for, though in the case of *Duppa v. Mayo*,<sup>(a)</sup> which was debt for the arrears of a rent charge, and the statute pleaded, but did not conclude to the country, but with a verification ; upon which plea the plaintiff demurred ; and judgment was given against the defendant for the bad conclusion of his plea. The learned editor of Saunders's Reports, in his note (2) upon this, observes, that as to *assumpsit*, it is clear that the statute must be pleaded ; and it seems questionable whether the same rule would not now be extended to actions of debt. On the one side, the same reasons for pleading the statute seem equally applicable to both actions. The statute contains several exceptions, such as coverture, infancy, imprisonment, and the like, which would take the case out of it in both actions alike. If the statute is not pleaded, the plaintiff is equally liable to be surprised, and therefore not prepared to answer, in one action as in the other. In either case, the statute does not extinguish the debt, but only takes away the remedy ; and it is optional whether the defendant will insist upon the statute, or waive it. And it is very usual in practice to plead to debt on simple contract, that the cause of action did not accrue within six years ; to which the plaintiff may, of course, reply, that he was within any of the exceptions in the statute, or that he sued out a *latitat* within time, as is the common case in *assumpsit*. But on the other side, the principal case is an authority to the contrary, viz. that there can be no such special replication ; for it is there held, that the plea must conclude to the country ; which decision can only be founded upon the ground that the words "*infra sex annos*" are surplusage ; for, [\*224] if the plea of *infra sex annos* were good, the proper conclusion, it should seem, would be with a verification. How-

(a) 1 Saund. 283.

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ever, the modern practice is, to plead the statute in one action as well as the other, and to conclude with a verification.[1]

The old way upon the statute of limitations was, for the defendant to plead the statute at large; but of late years, the general pleading of *non assumpsit infra sex annos* is allowed; therefore—

In an action of debt for rent, the defendant pleaded the statute of limitations, and that *causa actionis predictae, &c. accrevit* above six years before the writ brought. To this the plaintiff demurred, and the cause of demurrer was upon the late statute for reviving of process, *anno primo Willelmi & Mariae*: by which it is provided, in regard therè was an interruption of the government, and proceedings of law, from the 11th of December, 1688, to the 13th of February following, that the time within those days should not be accounted as any part of the six years to bar an action by the statute of limitations, or of the six months for bringing a *quare impedit, &c.* so as it was urged that the defendant should have shown that six years and so many days were elapsed as are between the 11th of December and the 13th of February. For the six years may be passed, yet the plaintiff may be within time by reason of the said statute.

But the court were of opinion that the defendant's plea was well, and this should be shown of the plaintiff's part; for [ \*225 ] the statute does not alter the form of pleading, but\*that should be as it was before; and the plaintiff, if the matter will bear it, is to help himself upon the said statute.(a)

(a) 2 Vent. 185.

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[1] Vide *M'Clure, late Sheriff &c. vs. Erwin & AL*, (3 Cowen's Rep. 213.) Cited, ante page 208, n<sup>o</sup> [1.]

*Non devisavit* pleaded to a writ of *formedon* is a special issue. *Dudley vs. Sumner*, 5 Mass. Rep. 438.

When the statute is pleaded to the entire of a declaration, and is bad as to part, it is bad for the whole.[1]

*Assumpsit*, in consideration that the plaintiff would deliver to the defendant such a deed; the defendant promised that he would redeliver it to him on request; and also, in consideration that he had, upon request, delivered to him another deed, the defendant promised to pay him 40*l.* and alleges that he had delivered to him the first deed; and although, at such a day afterwards, he made request, yet he had not redelivered the first deed, nor paid him the 40*l.* The defendant pleaded the statute of limitations, and that he did not promise within six years before the action brought; whereupon the plaintiff demurred; for the cause of action as to the first deed did not arise on the promise, but upon the refusal after request, and the request was within six years. And so held the court.

Then it was moved, that the payment of the money was to be without request, and therefore the plea was good as to that: to which it was answered, that the plea being entire to both parts of the declaration, and being ill in part, is ill in the whole; whereupon it was adjourned. But at a day afterwards, the court held the plea ill in the whole, for the reason alleged; and they cited a case between *Bridges and Ade* to have been so adjudged, and gave judgment for the plaintiff for the whole.(a)

(a) 1 Lev. 48.

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[1] A declaration contained a count for a *Libel*, and counts for *Slander*; the Defendant pleaded to the whole declaration, that the supposed grievances alleged, &c. did not accrue within *two years*; the Plaintiff replied, setting forth the time of commencing the action, and averring that the causes of action did accrue within *two years*, &c., and the Defendant rejoined, taking issue on the fact; and the Plaintiff demurred to the rejoinder; and the COURT said; "As it respects the Count for a *libel*, the plea of *non accrevit infra duos annos*, is bad, for the Statute of Limitations "for an action for a libel is *six years*. As an answer to the other "counts for *slander*, the plea is good. But the rule is, that if an "entire plea is bad in part, it is bad for the whole." And the Plaintiff had judgment. *Miller vs. Merrill*, 14 Johns. Rep. 348.



[ \*226 ]      \*When pleaded, it should state to the effect, that no cause of action accrued to the plaintiff within the time to which the particular action is limited.

In an action of trespass, assault, and false imprisonment, the defendant pleaded not guilty *infra sex annos*, and the plaintiff demurred.

And Mr. Serjeant Darnall, for the plaintiff, argued, that the court, upon this plea, as it was pleaded, would not take any notice of the statute of limitations, that if this plea were a good plea, it would be a good replication for the plaintiff to say, that he took out a writ within six years, which is absurd: that no issue could be taken upon this plea; or, if any issue could be taken upon it, yet, if a verdict were found for the plaintiff, no judgment could be given for him; because, though the defendant were guilty within six years, yet he might not be guilty within four. He said, that this plea was a negative pregnant; and though, where a verdict is found upon issue joined upon such a plea, that may, in some cases, make the plea good; yet, it is certainly naught upon demurrer. And for that he cited 12 Edw. IV. c. 6. Bro. Negative Pregnant, 38. Bro. same title, 42.

For the defendant, it was argued, that the statute of limitations is a general law, and that those pleas of the statute of limitations are never framed upon the statute, but are pleaded generally, without tying them up to, or taking any notice of, the act of parliament: that the plaintiff might have taken issue upon this plea, that the defendant was guilty within six years: and

that the largeness of the plea, taking in two years more  
[ \*227 ] than it \*needed, was for the benefit of the plaintiff;

that if, upon that issue, the jury had found for the defendant, he must have had his judgment, because, if he was not guilty within six years, it was a necessary consequence, that he was not guilty within four years. And that, if the verdict had been found for the plaintiff, he must have had his judgment too, because the plea of the defendant was falsified: like the case of

debt upon a single bill, the defendant pleads payment; if, upon issue joined, the verdict be found for the defendant, he cannot have judgment; but otherwise, if it be found for the plaintiff.

Holt, Ch. J. said, that the verdict's helping such a plea as this would not make it a good plea then upon demurrer. This must be a good plea either at common law, or upon the statute: it is not a good plea at common law, because, at common law, a man might bring his action at any time; neither is it a good plea upon the statute, because it does not disclose the matter that the statute makes a bar.

Powell, J. This plea, at best, is but argumentative; and such pleas are never good, especially where the matter that makes the bar is made by such an act of parliament, you ought to plead it in the words of the statute. Besides, if issue had been taken upon this plea, and there had been a verdict for the plaintiff, it would have been a jeofaile.

Holt. How could the plaintiff reply?

*Note.*—When this case was first stirred, in Michaelmas term, the court seemed all to be of opinion that the plea was good, because it gave the plaintiff an [ \*228 ]  
• advantage (a)

But this can only be taken advantage of on special demurrer.

In an action for criminal conversation, the declaration stated, that the defendant, on 1st January, 1792, and on divers other days, &c. at, &c. with force and arms made an assault on G. the plaintiff's wife, and there and then seduced her, &c. whereby the plaintiff, &c. and other wrongs to the plaintiff the defendant did, against the peace, &c. and therefore, &c. Pleas, 1st. Not guilty; 2dly. Not guilty of the premises in manner and form,

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&c. at any time within six years next before the exhibiting of the plaintiff's bill. On general demurrer, a question arose, whether the action were trespass or case.

And by Lord Ellenborough, Ch. J. It might be material to consider that point, if the question now were, whether the limitation of six or of four years only applied to this case: but if the defendant take the longer period, and plead not guilty within six years, that, of course, must include within four years; and the plea not having been specially demurred, is therefore good in either way of considering it.(a)

In trespass continued for many years, and the statute of limitations pleaded, the jury gives damages only for the time within the limitation.

[\*229] \*To an action for assault, battery, wounding, and imprisoning plaintiff, from 10th August, 24 Car. II. *usque exhibitionem billæ*; to which the defendant pleaded not guilty within six years; and the plaintiff replied, that the writ was sued out the 2d October, 1 Jac. II. and that the defendant was not guilty within six years next before the writ brought. Upon this issue was joined, and a verdict was given for the plaintiff, and entire damages.

Two exceptions were moved in arrest of judgment: 1st. That a verdict cannot help what appears to be otherwise upon the face of the record; that here the plaintiff declares that he was imprisoned the 10th of August, 24 Car. II. which was thirteen years before; and being one entire trespass, the issue is found as laid in the declaration; which cannot be for so many years between the cause of action and bringing of the writ; for if a trespass be continued several years, the plaintiff must sue only for the last six years for which he hath a complete cause of action: but when those are expired, he is barred by the statute.

2dly. When the plaintiff has any cause of action, then the statute of limitations begins; (a) as in an action on the case for words, if they be actionable in themselves, without alleging special damage, the plaintiff will recover damages from the time of the speaking, and not according to what loss may follow. So, in trover and conversion, when there is a cause of action vested, and the goods continue in the same possession for seven years afterwards; in such case, it is the first conversion which entitles the plaintiff to an action. So, in the case at bar, though this were a continued imprisonment, yet [ \*230 ] so much as was before the writ brought was barred by the statute.

On the other hand it was argued, that the verdict was good; for the jury reject the beginning of the trespass, and give damages only for that which falls within the six years; and this may be done, because it is laid *usque exhibitionem billæ*. If the defendant had pleaded not guilty generally, then damages must be for the thirteen years, though the plaintiff, on his own showing, had brought his action for a thing done beyond the time limited by the statute; but having pleaded "not guilty at any time within six years," if the verdict find him guilty within that time, it is against him. 2dly. As to the objection, that the cause of action arises beyond six years, though it do appear so in the declaration, yet that doth not exclude the plaintiff; for there might have been process out before, or he might be disabled by an outlawry, which may be now reversed; or he might be in prison, and newly discharged, from which time he hath six years to bring his action; for being under either of these circumstances, the statute does not hurt him.

*Obia.*—If an action of false imprisonment be brought for seven years, and the jury find the defendant guilty but for two days, it is a trespass within the declaration. This statute relates to a distinct, and not to a continued, act; for, after six years, it will be difficult to prove a trespass: many accidents

may happen within that time, as the death or removal of witnesses, &c.

Judgment was given for the plaintiff.(a)

[\*231] \*In the report of this case, Show. 493. Sir John Holt, in support of the judgment, said, that an action may be brought at any time within six years after his imprisonment, by the proviso in the statute 21 Jac. I. c. 16. Besides, every day is a new imprisonment; and a new trespass; and the verdict will be intended to be only for six years,(b) and the time is not material otherwise; and by the court held well enough.

The defendant may divide the time in an action for false imprisonment, and plead the statute as to part.

The plaintiff brought trespass for imprisoning him, and detaining him in prison from 32 Car. II. till the 3d of April, 4 Jac. II. The defendant pleaded as to all, till 34 Car. II. such a day, not guilty within four years; and as to the rest, a plaint, and a *capias* issued. The plaintiff demurred.

*Et per Curia.*—Though the imprisonment be complained of as one continued imprisonment, yet the defendant may divide the time, and plead the statute as to part, and the plaintiff may reply the continuance; therefore, as to this, judgment was given against the plaintiff upon his demurrer, but for him as to the rest; because the *capias* was awarded by the court, *ex officio*, and it did not appear the defendant meddled in it.(c)

The plaintiff, by his replication to the statute,[1] either af-

(a) 3 Mod. 110.

(b) The plea was bad, being for six years, whereas it should have been; "Not guilty within four years." Ante, 226.

(c) Salk. 420.

[1] In *indebitatus assumpsit*, between Merchant and Merchant, the Statute of Limitations is a good plea, and if it be an account

firmly that the cause of action accrued within time  
\*before the suit was commenced, that he commenced [\*232]  
the suit within time, and continued it up to the time  
of declaring, relies upon the fourth section, [1] or shows that

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current not liquidated, the Plaintiff should reply specially and shew that matter. *Edwards vs. Davis*, 4 *Bibb's Rep.* 211.

[1] It is a good replication to the plea of the Statute of Limitations, that the plaintiff brought his action within one year after a *nonsuit*, and that it is the same cause of action. *Skillington vs. Allison & Al.*, 2 *Hawk's Rep.* 347.

To an action of *Assumpsit*, the defendant pleaded the *Statute of Limitations*; The plaintiff replied a former suit wherein judgment was arrested; the defendant *demurred generally*; and the Court gave judgment for the plaintiff. *Schnertzell vs. Chapline*, 3 *Harr. & M'Hen. Rep.* 439.

If in *Assumpsit*, the defendant plead the Act of Limitations, and the plaintiff would avoid the plea by a former suit having been brought in time, he must reply the former suit specially: he cannot give it in evidence under a general replication to the plea. *Boyle & Al. vs. Conway's Ex'ors.* 3 *Call's Rep.* 1.

To a declaration in *Assumpsit*, the defendant pleaded *Non assumpsit*, and the Statute of Limitations; the plaintiff replied to the last plea, that he sued out a Bill of *Middlesex* on the 8th of August, 1805, (being in the Vacation,) within six years after the cause of action accrued, to which the Sheriff returned *non est inventus*, and the replication then stated the *alias* and a succession of *pluries* Bills, down to Easter Term, 1811, to each of which, but the last, it was averred, that the sheriff made no return, and that the defendant did not appear, but that he did appear to the last on the return day, when the plaintiff offered himself against the defendant in the plea aforesaid, as by the Record and proceedings thereof, remaining in the said Court, &c. at large appears. To this replication the defendant rejoined, that "Bill of *Middlesex*, first mentioned in the replication was not delivered "to the sheriff until, after the return thereof, or to any sheriff of *Middlesex* until long after the expiration of a year next after *Michaelmas* term in the replication first mentioned, to wit, until "the 26th of January, 1811." And the rejoinder further alleged,

his action was saved to him by the proviso contained in the seventh section.[2] This part of the subject has been anticipated in treating of the commencing and suing of actions.

that the sheriff did not return the first Bill of *Middlesex* before the said first day of *January*, 1811, nor was the said bill returned into Court and filed according, &c. at any time previous thereto; and concluded to the country. To this there was a special demurrer; and was *Held*, 1st. That the latter allegation in the *Replication*, had reference to all and every the prior process stated, and was therefore tantamount to an allegation of the sheriff's return of *non est inventus* to the first Bill of *Middlesex* stated, with a *prout patet*, &c.; against which there could be no averment in pleading. 2dly, That the Court will take notice in pleading of the issuing of the Bill of *Middlesex*, on a day in Vacation, though it be not pleaded to have been then issued as of the preceding term. *Harrington vs. Taylor*, 15 *East's Rep.* 378.

[2] Declaration containing several Counts; Plea, Non assumpsit infra sex annos. Replication, as to the first ten Counts, that before and at the time of making of the said several promises, defendant was in parts beyond the seas, and afterwards returned to this kingdom, which was his first return after making the said several promises, and within six years next after such return, the plaintiff sued out a Bill of *Middlesex*, returnable; &c. to answer the plaintiff of a plea of trespass, to which the sheriff returned, *non est inventus*. The replication then stated various writs continuing the process, but did not describe them as *alias* and *pluries* writs, and the last had an *ac etiam* clause. The replication next stated, that the first mentioned precept was sued out by the plaintiff with intent to implead and declare against the defendant for the several causes of action in the declaration mentioned, and accordingly the plaintiff did exhibit his bill. There was a special demurrer to this replication, and one of the causes assigned was, that it did not appear that the plaintiff [defendant ?] had not returned to this kingdom after the making of the said promises and undertakings in the first eight counts, mentioned, and more than six years before the suing out of the first mentioned precept. *Seem- ble*, That it did sufficiently appear that the defendant's return was the first after each of the promises mentioned in the first ten counts. But, *held*, at all events, that the want of the words, "*each and every of them*," was not assigned with sufficient distinctness as a cause of Demurrer. *Held also*, that the *ac etiam* writ was a good continuance of common process, and that the continuances need not be by *alias*, and *pluries* writs. *Plummer vs. Woodburne*, 4 *Barnew. & Cress. Rep.* 625.

When the plaintiff replies a *latitat*, or *capias*, sued out within time, he must show that it has been returned and continued by *vicecomes non misit breve*. It must be a continuance of the same writ or process which was originally sued out, and must appear on the record to be so. (a)

It is, however, to be observed, that in *Whitehead v. Buckland*, Sty. 373. the plaintiff replied an original, but did not show the continuances upon the roll. It was held that the plea was plain, and that it was not necessary to show all the continuances, for there was an appearance. [3]

In the case of *Every v. Carter*, (b) the plaintiff replied a *clausum fregit* within time, but did not plead the continuance.

And where the plaintiff, an attorney of the common pleas, sued the defendant by an attachment of privilege, and in Michaelmas term, 17 Geo. II. declared that the defendant was attached by writ of privilege, &c. and to the statute pleaded, replied, that he sued out a writ of privilege, the 7th day of July, 16th Geo. II. and that the said defendant did make such promise within six years next before the suing forth the said writ of privilege. To this replication there was a demurrer, and joinder in demurrer. The court of common pleas were of [\*233] opinion, that an appearance to process cures all er-

(a) Anta. 150.

(b) 2 Vent. 259.

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[3] Where the plaintiff replies an original writ sued out, he must shew it to have been continued up to the time of trial. *Admr. of M<sup>d</sup> Dowell vs. Exors. of Goodwyn*, 2 Rep. Const. Ct. So. Car. 441.

A *Replication*, stating that the plaintiff sued out a writ for the same cause of action, within the time prescribed by the Act, which writ was executed and returned, and went off the Docket for want of formality, is no answer to the bar set up by the plea of the Act of Limitations. *Callis. vs. Waddy*, 2 Munf. Rep. 511.



rors and defects therein, and gave judgment for the plaintiff below.

A writ of error was brought, and the general errors assigned. For the defendant in error it was argued, that an attachment of privilege in the common pleas is in the nature of an original writ, and if an original writ is replied to the plea of the statute of limitations, it is sufficient to show the teste of it when issued, without any continuances. And of such opinion was the court.(a)

The authority of this case is extremely doubtful; for, in an action of *assumpsit* for fees due to an attorney, the defendant pleaded *non assumpsit infra sex annos*. The plaintiff replied, that on such a day, two years before, he had sued out an attachment of privilege against the defendant; upon which writ, *taliter processum fuit*, that the defendant (on such a day in Hilary term, anno 2 Wm. &c.) appeared, and the plaintiff declared against him, *moda et forma, &c.* And upon demurrer to this replication it was held ill, because the plaintiff did not set forth any continuance of this writ of attachment, (*per vicecomes non misit breve*,) which was sued out above two years before: for it is impossible that the defendant should appear in Hilary term, anno 2 Wm. to ~~appear~~ it returnable two years before; and no other writ is set forth by the plaintiff. But if the plaintiff, after the *taliter processum fuit*, had shown the last attachment, and the return thereof, upon which, in truth, the defendant did appear, it had been well enough, without showing any of the continuances.(b)

[ \*234 ] \*And where, to an action on the case on promises, the defendant pleaded the statute of limitations; the plaintiff replied a *clausum fregit* sued, returnable in the common pleas, before the six years, *ea intentione* to declare in this action

(a) 1 Wils. 167.

(b) Carth. 144.

upon the case; and did not show that the writ was continued: and upon demurrer, judgment was given for the defendant.(a)

And so in *Karver v. James*,(b) and *Stratton v. Savignac*,(c) and in the case of *Kinsey v. Heyward*,(d) it was determined, both in the king's bench and in parliament, that an original must be returned and continued. And it does not appear in the report of the case in *Wilson*, that any one of these cases were cited.

But it does not seem necessary, in replying an original, or a *latitat*, to do so with a *prout patet per recordum*.

In *Whitehead v. Buckland*, Sty. 373, one of the causes of demurrer was, that plaintiff saith he hath sued out his original, but doth not say, *prout patet per recordum*.

And in an action on the case on promises, the defendant pleaded the statute of limitations, and that *non assumpsit infra sex annos*. The plaintiff replied, that such a day he took out a writ of *latitat*, and so continueth it down by a *vicecomes non misit breve*, and did not conclude *prout patet per recordum*, for which cause the defendant demurred. But, *per Curiam*, and the clerks—This is needless; the *latitat* roll being only for the private use of the court, and no record.(e)

\*It has been held, that if the bill of Middlesex be [\*255] sued within the time, the replication will not answer the plea of the statute of limitations, if it show the bill to be returned on the same day it was sued out. *Ld. Raym. 773. Green v. Rivell*. But this is not so at the present day; for it is the constant practice to sue out writs returnable on the same day; and the case of *Green v. Rivell* was overruled by *Oxlade v. Davidson*, 4 T. R. 611. The plaintiff may reply a *latitat*, or

(a) *Ld. Raym.* 701.

(b) *Wilson*, 255.

(c) 3 R. & P. 330.

(d) 1 *Ld. Raym.* 432.

(e) 2 Keb. 46.

*capias*, without showing either a bill of Middlesex, or original preceding.

Coles brought an action of trover and conversion against Sibsy. The defendant pleaded the statute of limitation of actions in bar of the action. The plaintiff replied, that he took out a *latitat* out of this court against the defendant within the time limited by the statute, which still continued depending.

Rolle, Ch. J. said, A *latitat* out of this court is in the nature of an original in the common pleas, and so hath been always held to be. (a)

In *Hollister v. Coulson*, Str. 550. the defendant pleaded *non assumpsit infra sex annos*; the plaintiff replied a *latitat*; and the court, on demurrer, held it well enough, without showing a bill of Middlesex.

*Assumpsit* upon a promissory note, payable to B. or order, signed by the defendant, and endorsed to the plaintiff, the defendant pleaded the statute of limitations; the plaintiff replied a *latitat*, sued out within the six years, and regularly [\*236] continued, &c. to which there was a rejoinder, and a demurrer to the rejoinder. Which being held ill, it was objected, for the defendant, that the plaintiff ought to have shown a bill of Middlesex as a foundation of the *latitat*, the *latitat* referring to it. But adjudged, the replication of the *latitat*, without showing a bill of Middlesex precedent, was sufficient to avoid the statute. And so it was adjudged, Mich. 9 Geo. B. R. *Hollister v. Coulson*, Str. 550. See Styles, 156. 1 Sid. 53. 60. Judgment for plaintiff. So, in *Karver v. James*, Willes, 257. the court all agreed that the *capias*[1] was sufficient, without set-

(a) Sty. 156.

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[1] To a plea of the Statute of Limitations, it is not a good replication, that a suit for the same demand was commenced in a court in another state, and discontinued within six years. The com-

ting forth the original ; it being the constant course of the court to take out a *capias* without an original.(a)

We have seen, that when the statute begins to operate, it runs over all mesne acts : (b) therefore, if the statute of limitations be pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will ; and in such case, the plaintiff cannot reply a promise to himself, as that would be clearly a departure in pleading. [2]

To an action on the case on several promises, all laid to be made to the testator in his life-time, with a profert of the letters testamentary, the defendant pleaded, that he did not promise within six years before the obtaining of the original writ of the plaintiffs, who replied the time of suing out the writ ; [3] and that,

(a) *Ld. Raym.* 1441.

(b) *Ante*, 84.

mencement of a suit, to defeat the Statute of Limitations, must be the same suit, to which the plea is pleaded. *Delaplaine vs. Crowninshield*, 3 *Mass. Rep.* 329.

[2] Where to a plea of the Statute of Limitations, the plaintiff replies that both plaintiff and defendant were *beyond seas*, at the time the cause of action accrued, to wit in another state, a rejoinder of the Statute of Limitations of such other state is a departure from the plea, and fatal on demurrer. *Harper vs. Hampton*, 1 *Harr. & Johns. Rep.* 453.

[3] To an action of debt on bond, the defendant relying on the Statute of Limitations of New-Jersey, [*Rev. L.* 411. s. 6.] pleaded that the cause of action did not accrue within sixteen years, next before the commencement of said Action. *Replication*, That after the making the writing obligatory, and before the commencement of the action, to wit, &c. on, &c. the defendant acknowledged himself to owe to the plaintiff the sum of, &c. in the said writing obligatory mentioned. To this replication the defendant demurred ; and the plaintiff joined in demurrer. *Penninton, J. delivering the Opinion of the Court*, said, "The replication must contain an answer to the plea ; can it be said

within six years before the day of obtaining thereof, [\*237] that is to say, on such a day, \*the letters testamentary aforesaid were duly granted, &c. by which the said action of the plaintiffs accrued to them within six years. This replication is bad, for the time of limitation is computed from the time when the first action accrued to the testator, and not from the time of proving the will. And as it has been ruled, that where all the promises in the declaration are laid to be made to the testator, that an executor cannot give in evidence a promise to himself (a) within six years; [1] and if he cannot, setting forth such a promise to himself in his replication, as the executors did in this case, is a departure in pleading. (b)

But where, to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money after his death, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff, the defendant pleaded the statute of limitations, and the plaintiff replied the special matter; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death; and

(a) *Salk.* 28. *Ante*, 163.

(b) *Willes*, 27.

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"with legal propriety that the cause of action accrued on a bond, at the time that a parol acknowledgment was made by the obligor that the money was due on it; an acknowledgment might be given in evidence to rebut a presumption of payment arising from length of time or other causes; but it does not constitute an independent cause of action."—"As the law now is, and under the pleadings in this case, I am of opinion, that the replication is bad; and that the defendant is entitled to judgment." *Masson vs. Seabury*, 2 *Penn. Rep.* 702.

[1] In the case of *The Executors of the Duke of Marlborough vs. Widmore*, (2 *Str.* Rep. 890.) The plaintiffs declared as Executors on a promise to their Testator; and issue was joined on a plea of the Statute of Limitations. Then the plaintiffs moved to amend, by laying the promise to have been made to themselves: And the Court ordered the amendment, on payment of costs, and liberty for the defendant to plead *de novo*.

the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him. (a) [2]

(a) Salk. 422. Carth. 335.

[2] In an action by an Administrator upon a Bill of Exchange, payable to the Intestate, but accepted after his death, to the declaration was subjoined a profert of the Letters of Administration; Plea, that the causes of action did not accrue within six years before the commencement of the action. Replication, that the causes of action did accrue within six years, &c. Held, that the Statute of Limitations begins to run from the time of granting the Letters of Administration, and not from the time the bills became due, there being no cause of action until there is a party capable of suing; and that it was not necessary to reply specially, there being profert of the Letters of Administration which shewed the time of granting them, to be within six years before suit was brought. *Arnor, Ch. J. who delivered the Judgment of the Court, said;* "And this is very different from all the cases in which a special Replication is usually made, such as infancy, coverture, absence beyond sea, or the suing out a Latitat, or other writ, or process, because, in all those cases, the Plaintiff admits, that the action did not really accrue within six years of the apparent commencement, and either brings himself within some exception in the Statute, or shows that his action was commenced before the date, which the Plea assigns as the commencement of it." *Murray, Admr. &c. vs. The East India Company, 5 Barnw. & Ald. Rep. 204.*

And in the case of *McLellan's Admr. vs. Hill's Exor.* (*Cam. & Norw. Rep. 479. 483.*) THE COURT said, "Though we can find no decision directly in point, yet we believe the Law has generally been understood, that the Act of Limitation will not run but from the time that administration was obtained, nor does this impose any hardship or injustice on the Defendant, on whom there is a moral obligation to pay, notwithstanding any length of time that the debt might have become due; in case of an Executor it is otherwise, for the moral obligation on him to pay, ceases whenever the assets are taken out of his hands, or when he is bound by Law to deliver them to another." [By the Act of April, 1784, the Administrator, in North Carolina, as soon as he has finished his administration, and no creditor makes any further demand, is bound to pay what remains in his hands into the public Treasury; where it is to remain subject to the claims of creditors, &c., and the Treasurer is empowered to compel payment of such residuum.]

When the plaintiff replies the fourth section, he states, that he obtained a judgment which was reversed; and that he now

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"If money belonging to an intestate's estate be received by the Defendant before administration is taken out to the creditor, the Administrator will be allowed three years from the time he administers; because, when the cause of action did accrue, there was no person who could bring suit." (*Per TAYLOR, Ch. J. delivering the Opinion of the Court.*) *Jones, Admr. &c. vs. Brodie, Admr. &c.* 3 *Murph. Rep.* 585.

Under the Act of 1715, Ch. 48, [*North Carolina*,] requiring "the Creditors of any person deceased to make their claim within seven years after the death of such debtor, otherwise such creditor shall be for ever barred," two circumstances must concur to put the bar in operation, to wit: the death of the Debtor, and the simultaneous existence of a creditor. If, therefore, the creditor die before the Debtor, and no administration be taken out on his estate, in the life-time of the Debtor, but is taken out afterwards, and suit is brought in due time, although it be more than seven years after the death of the Debtor, the Act of 1715 does not bar the claim. But, if a Debtor die in the life-time of his Creditor, whose cause of action has accrued, the Act of 1715 will attach upon the claim of the Creditor, although no administration be taken out on the Debtor's estate for more than seven years. *Jones, Admr. &c. vs. Brodie, Admr. &c.* 3 *Murph. Rep.* 594.

In the case of *The Administrators of Quince vs. The Administrators of Ross* (2 *Hayw. Rep.* 180.) JOHNSTON, JUDGE, delivered the Opinion of the Court in the following terms: "This bond was given in 1764, payable in December, 1764; in 1777, the obligor died; Letters of Administration issued in 1778, in the month of January; in 1794, the administrator died, and in 1798 new Letters were issued to the present defendant. The rule is that after 20 years acquiescence presumption of payment shall arise, but if any circumstances can be offered to account for the delay, these shall hinder the presumption. Now here, from 1773 to the first of June, 1784, the Courts were shut up and the war intervened: after 1784 till 1794, when there was an administrator, is but 10 years, and from December, 1764, to 10th March, 1773, is but six years, added together 16. After 1794, till the commencement of this action, suit could not be brought, because there was no person to be sued; which sufficiently accounts for the delay, so that there is not 20 years of computable time from the period when this bond was payable to the commencement of this action, and the presumption, will not arise."

sues within a year after the reversal; or that he obtained a verdict, and judgment was arrested; or the plaintiff may say, in his replication, that he sued out an original upon which the defendant was outlawed, or the \*outlawry was afterwards avoided by plea, or reversed on error, and he sued within a year.(a)

So, where, within the equity of the fourth section, the executor, &c. brings a new action,(b) recently after the death of the testator, the replication states, that the testator, on, &c. in such a term, in such a year of the king's reign, sued out a *capias ad respondendum* (for instance) against the defendant, returnable on the morrow of All-Souls, that the sheriff returned, that the defendant was not found in his bailiwick; and then continue the *capias* from term to term, down to the time of the testator's death; that he appointed the plaintiff his executor, recently af-

(a) 2 Saund. 68. g. n. 6. Ante, 164-5.

(b) Ante, 168.

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*Et vide*, ante, page 118, note [1.] & page 119, note [1.]

Where A. has a demand against B. which is not barred by the Statute, and B. dies intestate, the Statute of Limitations, will not run until Letters of administration are taken out; though there may be an executor *de son tort*. *Ex'ors of Burnet vs. Adm'rs. of Bryan*, 1 Halst. Rep. 377.

To an action against an administrator *de bonis non*, upon a promise made by the intestate, it is a good plea in bar, that four years since the original taking out Letters of administration, elapsed during the life of the former administrator. *Heard vs. Meader*, Adm'r. 1 Greenl. Rep. 156.

Assumpsit against administrators; Plea, Statute of Limitations; Replication, that suit was instituted within one year after the death of the intestate, and that five years after the cause of action accrued, had not expired at the time of the intestate's death; *Held*, not a sufficient answer to the plea; and that an issue joined on a rejoinder to such replication was an immaterial issue. *Langford's Admrs. vs. Gentry*, 4 Bobb's Rep. 468. & *Vide Langkopff vs. West's Executrix*, 3 Harr. & M'Hen. Rep. 197, 202.



ter whose death, to wit, in such a term, &c. the plaintiff sued out the writ upon which the action is founded; that the several writs so prosecuted by the testator against the defendant were with an intent to have impleaded the defendant, upon the several promises in the declaration specified; and that the writ sued out by the plaintiff against the defendant was prosecuted against him with the intent to implead him for the causes of action in the declaration specified; and upon his appearance, to declare against him for the said several causes of action, and that he afterwards, on, &c. declared against the defendant, &c. with an averment, that the several causes of action accrued within six years next before the suing out of the writ of *capias ad respondendum* first above specified, by the testator, &c. (a)

All these special replications conclude with a verification, to give the defendant an opportunity of answering the special matter.[1] And where a *latitat* is replied to avoid the statute

(a) 2 Saund. 64. a. n. 6.

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[1] In an action of assumpsit, the pleas were *Non assumpsit*, and the *Act of Limitations*. The plaintiff replied generally to the first plea, and *specialty* to the second; but no *Rejoinder* was put in by the defendant. It was said in the transcript of the record, that a jury was impannelled to try the *Issues* joined. But it was decided by this Court [Supreme Court of Appeals, of Virginia] that no issue was joined on the *second* plea, and therefore, that a verdict for the plaintiff, be set aside, and a new trial directed. *Totty's Executor vs. Donald & Co.* 4 *Munf. Rep.* 430. & *Vide* (same point,) *Milner vs. Davis*, *Litt. select. cas.* 436.

Plea of the Statute of Limitations; General Replication, that the defendant did promise within six years; *Held*, that fraud in the defendant could not be set up as an answer to the Plea. *Quere*, Whether it would be a good answer if *specialty* replied? *Clark, Adm'r. &c. vs. Hougham*, 2 *Barnew. & Cress. Rep.* 149.

If the defendant in Equity plead the Statute of Limitations, and the complainant come within any of the exceptions in the act, he will not be entitled to the benefit thereof, unless he set it forth by a replication. *Lewis' Executor vs. Bacon's Legatee*, &c. 3 *Hen. & Munf. Rep.* 89.

of limitations, the defendant may, in his \*rejoinder, [ \*239 ] show the true time of suing out the writ, though an averment contrary to the record.(a)

A variance in the replication from the declaration, in an immaterial matter, is no departure.

Trover and conversion of a ship and nine pieces of ———; and declares that 1st March, 21 Jac. I., he was possessed of, and the same day lost them, which came to the defendant's hand, who, 3d October, 8 Car. I., converted them to his proper use. The defendant pleaded the statute of limitations; and that the 20th March, 19 Jac. I., *causa actionis accrevit*; so as not only three years and more are incurred since the parliament, but also six years after the conversion before any action commenced; *et hoc, &c.* The plaintiffs replied, that they were possessed of the said ship as of their proper goods; and so being possessed before the 20th March, 19 Jac. I., viz. 1st March, 19 Jac. I., they agreed at London aforesaid, in *parochia et warda predicta*, that the said defendant, as their servant, should transport the said ship and goods to T. in Spain, being parts beyond seas, and should afterwards restore them to the plaintiffs upon request; whereupon the defendant, taking the said ship the said 1st March, 19 Jac. I., transported her to parts beyond seas, viz. to T. and 20th Mar, 19 Jac. I., there sold the said ship and goods to persons unknown, and converted them to his proper use: and that the defendant, after the said conversion, remained in *partibus transmarinis usque* 1st May, 1 Car. I., by reason of which stay they could not sue him *per legem terræ*: and that,

(a) Burr. 962. Ante, 119.

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In Chancery, a pure plea of the Statute of Limitations in answer to a Bill charging circumstances to take the case out of the statute, is no bar unless it be supported by an answer, denying or destroying the force of those circumstances. *Bloodgood & Al. vs. Kanes*, (On Appeal.) 8 Cow. Rep. 360. & *Vide Kanes vs. Bloodgood & Al.*, 7 Johns. Ch. Rep. 90, *Same Point*.

1st May, 1 Car. I., he returned; whereupon, 1st October, 3 Car. I., at \*London, they required him to deliver the said ship and goods, which to do he refused; but the said ship and goods, *ad hunc et ibidem*, converted and disposed *prout superius continetur*; *et hoc, &c.* And upon this replication the defendant demurred.

It was urged, that here the replication was a departure from the declaration; for, by the declaration the plaintiffs suppose a casual loss, and a trover by the defendant, 1st March, 21 Jac. I., but in the replication they suppose an agreement to transport the said ship and goods, and afterwards to restore them to the plaintiffs; and that the defendant sold and converted them to his proper use the 20th March, 19 Jac. I., and so a variation between the declaration and replication in the time and manner how the defendant had them.(a)

Richardson, Jones, and Berkeley, Js. held, that the replication was no departure, but was pursuant to the count, and fortifies it; But Croke, J. conceived it was a departure, because it varies in the matter and in the time; for the declaration supposeth a possession of the goods, and that 1st March, 21 Jac. I., he lost them; and the same day the defendant found them; and the 1st October, 3 Car. I., converted them: and the plaintiff, in his replications, shows, that he, the said 1st March, 19 Jac. I., delivered them to the defendant, to transport them to T. in Spain, and to redeliver them upon request; and after shows, that the defendant, 21st March, 19 Jac. I., at St. T., sold and converted them to his own use; so it varies in the point how the goods \*came to the defendant's hands, both for the matter and time.(b)

In *assumpsit*, on a promise made the 1st May, 3 Car. I. for money lent, the defendant pleaded that the writ was first brought the 4th February, 14 Car. II. and that he did not promise with-

(a) Cro. Car. 245.

(b) Cro. Car. 245. 333.

in six years before the said 4th of February. The plaintiff replied, that he assumed within six years before the said 4th of February. And after verdict, it was moved in arrest of judgment, for that the replication was a departure from the count.

But by the Court—The replication is no departure from the declaration; for the time put in the declaration was not material, for he might declare of an assumpsit at any time; but when the defendant makes the time material by his plea, the plaintiff may, by his replication, answer to that plea, for maintaining his action, by the time that before was not material.

And they gave judgment for the plaintiff.(a)

And also, where the defendant, at the parish of Bow, in the ward of Cheap, London, was indebted to the plaintiff, he promised to pay, &c. The defendant pleaded the statute; and the plaintiff replied that the debt was contracted at Teneriffe, beyond sea, viz. in the parish and ward aforesaid; and that, within six years after his return, he brought the action. The defendant demurred, for that the replication was a departure from the declaration, which lays the indebtedness at Bow, in London, and the replication is at Teneriffe, beyond sea.

\*But by the Court—'Tis well enough, it also say- [\*242]  
ing in the parish and ward aforesaid.(b)

The plaintiff declared upon a promise made the 16th of January, 1706. The defendant pleaded in bar the Statute of Limitations; and that the cause of action did not accrue within six years before the exhibiting of the bill. The plaintiff replied, the bill was exhibited the 23d January, 1713, and that cause of action did arise within six years before exhibiting the bill. To this the defendant demurred.

(a) 1 Lev. 110.

(b) 1 Lev. 143.

Parker, Ch. J. delivered the resolution of the Court. Judgment must be given for the plaintiff; for this being the case of a parol promise, the day in the declaration is not material; and, therefore, the plaintiff, in his replication, has only departed from an immaterial part of his declaration, which would be cured by a verdict, and is now aided upon a general demurrer, by statute for amendment of the law. Were it more than matter of form, a verdict finding the promise at another day could never cure it, as most certainly it would. And for this purpose was quoted the case of *Lee v. Rogers*, where this learning is laid down, that for the plaintiff to vary from the time or place in his declaration, in order to follow the defendant's plea, is not a departure. In the old books, indeed, this would have been a departure. And unless what, strictly speaking, is a departure, be sometimes allowed; unless the plaintiff, where the defendant, by his justification, makes the time or place material, may follow [ \*243 ] the defendant's plea, though it \*lead him to another time or place; all that doctrine, that in transitory actions, where time and place are not material, the plaintiff may declare at any time or place, must fall to the ground.

Judgment for the plaintiff.(a)

(a) 10 Mod. 343.

## APPENDIX.

### NOTE (A.)

As the doctrine of "*Adverse Possession*," lies at the root of all the decisions, which have been made, on those parts of the Statutes of Limitations, that relate to real and possessory actions, (except some few of the cases embraced by the provisos,) an accurate knowledge of the whole extent and bearing of that doctrine, is indispensable to a correct understanding of such parts of those statutes.

A full, careful and impartial examination of this important topic it is, therefore, believed, will not be deemed either useless or unacceptable: The references to all the American authorities on the subject, and to such of the English decisions as are not commented upon in the text, will enable the candid and intelligent reader to examine and decide for himself, whether or not, the conclusions at which the Editor may arrive, are founded upon a just view of the Statutes, and sanctioned by the authority of express adjudications; and if not, to discover and correct any misapprehensions or errors into which he may chance to fall.

Adams, in his valuable treatise on the action of Ejectment, (page 47) says,

"It is not easy to define what will constitute an adverse holding of this nature, but it may be safely laid down that an adverse possession will be negatived, when the parties claim under the same title, when the possession of one party is consistent with the title of the other, when the party claiming title has never in contemplation of law been out of possession, and when the possessor has acknowledged a title in the claimant."

This doctrine is confirmed by the following authorities:

1st. Where the parties claim under the same title.

"To constitute an adverse possession there must be a possession under colour and claim of title; but *Beekman's* entry, claiming as tenant in common under the same title as that of the Lessors of the plaintiff, qualified his entry and admitted the title of the Lessors; so that neither *Beekman* nor the defendants, [*they claimed title under Beekman*] could set up that entry as adverse to the common title, or as injurious to the rights of the other tenants in common." *Smith ex dem. Teller & others vs. Burtis & Woodward*, 9 Johns. Rep. 179, 180. And to the same purport *Vide*

*Jackson ex dem. Fisher vs. Creal & Kellogg*, 13 Johns. Rep. 116.  
*Jackson ex dem. Sinsabaugh & others vs. Sears*, 10 Johns. Rep. 435.  
*Jackson ex dem. Stevens vs. Stevens* 16 Johns. Rep. 116.  
*Jackson ex dem. Corson & Sebring vs. Cairns & Coles*, 20 Johns. Rep. 301.  
*Jackson ex dem. Hill vs. Streeter*, 5 Cowen's Rep. 531.

In the case of *Den ex dem. Midford & Uz vs. Hardison* (3 Murph. Rep. 166.) TAYLOR, CH. J. *delivering the Opinion of the Court*, said; "As an adverse possession alone, will not take away a right of entry, neither will it, when under a title which is common to the plaintiff and defendant; the intendment of Law being in such case, that the defendant's entry was for the benefit of all entitled as co-heirs. Where both parties claim by descent from the same common ancestor, a color of title by virtue of such descent, cannot be set up by one against the other, whatever may be the effect of a descent in any other case, which the court does not decide." & *Vide Witham vs. Perkins*, 2 Greenl. Rep. 400.

A person coming into possession under a will cannot obtain a right by possession adversely from others claiming under the same will: possession as to them is fiduciary. *Vaux, Executor, &c. vs. Nesbit & Al. Executors, &c.* 1 McCord's Ch. Rep. 352, 360.

"For in general where two persons claim by the same title, there shall be no adverse possession so as to toll an entry of the one, but the entry of the other be at all times lawful." 2 Esp. Ni. Pri. 8. (old paging 434.) *Carothers & Al. vs. The Lessee of Dunning & Al.*, 3 Serg. & R's. Rep. 386.

"Therefore, where one party claims under or through the other, there shall be no adverse possession in such case sufficient to give a title." 2 Esp. Ni. Pri. 9. (old paging 435.)

Purchasers under the same title, without partition, cannot prescribe against each other, by the lapse of ten years. *Broussard vs. Duhamel*, 3 Martin's Rep. N. S. 11.

In *Gay vs. Moffit*, (2 Bibb's Rep. 506. & Seq.) the Opinion of the Court was delivered by JUDGE LOGAN; who said, "This was an action of ejectment, in which the appellant, who was the defendant below, relied on his adverse possession for twenty years.

One of the grounds opposed to this possessory right, is an agreement, by which the defendant, after his entry on the land, had purchased the same from the plaintiff, agreeing therein to pay rent upon certain contingencies."

"Where one claims under or through the other, there shall be no adverse possession in such case sufficient to give a title. Nor does it seem to vary the rule that such claim was acquired posterior to the entry on the land. For where a cottage built in defiance of a Lord and quiet possession of it for twenty years, was held to be within the Statute; yet it was ruled that if it had been built at first by the lord's permission, or any acknowledgment had since been made, the Statute would not run against the Lord. And although the reason there assigned, is, that the possession of a tenant at will works no *disseisin*; still the principle is the same, to stop the running of the Statute by the acknowledgment or agreement subsequently made; thereby converting an *adverse hostile* possession into a friendly possession, claiming protection under the same right, but the tenure thus conferred seems unimportant with respect to the effect produced on the running of the Statute; for whether it be at will, or for a term of years or for a greater estate is deemed totally immaterial. (*See Esp. 435. Bull. N. P. 104.*)

"This doctrine seems also to be supported in the case of *Brandt vs. Ogden*, decided by the Supreme Court in New York, (1 Johns. Rep. 157.) In that case it is said, that in order to bar the recovery of the plaintiff who has title, by a possession in the defendant, strict proof has always been required, not only that the first possession was taken under a claim hostile to the real owner, but that such hostility has existed on the part of the succeeding tenants. The operation of the Statute in such case seems to cease against a claim purchased or brought in aid of the protection of the possession. A claim thus recognized, and brought in to protect the possession, cannot be *adverse* and *hostile* to it. And when in the general, persons claim by the same title, there shall be no adverse possession so as to toll the entry, but the entry of the other be at all times lawful. (*Esp. 434. Co. Litt. 242, 296.*)

"If, therefore, we consider the appellant as having no other title than that derived from possession, and that his possession has been changed from an *adverse hostile*, into a friendly possession, it follows that the Statute of Limitations, does not apply to his case."

But; to change the character of a possession from adverse to amicable, some agreement legally obligatory must be made, acknowledging the title of the plaintiff; a mere verbal agreement to buy in an overhanging title, will not stop the running of the Statute of Limitations. *Daniel vs. Ellis & Al.*, 1 Marsh. Rep. (Ky.) 60.

And in the case of *Briscoe's heirs vs. McGee & Al.*, (1 Marsh. Rep. (Ky.) 190.) GWSLEY, J. delivering the Opinion of the Court, said; "And as the plaintiff, Parmenias Briscoe, is proven



"to have entered upon and taken the possession of the land in contest, in company with and by the direction of his father, Gerard Briscoe; and as the possession appears also to have been taken under the claim of Gerard Briscoe, then actually surveyed, the possession so taken we are of Opinion, should be considered *adverse* to that of the defendant in Error, although Parmenias, by a contract with a certain Inlow, to whom it is shewn the defendant had previously sold his claim to the land, purchased and paid him for the improvements made upon the land."

2d. When the possession of one party is consistent with the title of the other.

Lands were devised to trustees with a power of sale, under a promise, however, that in the mean time and until the sale of the estate, the rents, issues and profits should be received by that one of the *Cestui que trust* who was before entitled to them. That *Cestui que trust*, A, continued in possession of the lands, receiving the rents and profits for more than twenty years, without any interference on the part of the trustees; and he then sold it to a purchaser for a valuable consideration and without notice, who entered into and continued in possession of the premises. A. died; and the trustees afterwards brought their ejectment against the purchaser in possession; *Held*, That A.'s possession and receipt of the rents, issues and profits of the estate, though for above twenty years after the creation of the trust without any interference of the trustees, did not shew his possession, to be adverse to their title, so as to bar their ejectment against his grantees; such possession and receipt being consistent with and secured to him by the deed of trust. *Keene ex dem. Lord Byron & others vs. Deardon & others*, 8 *East's Rep.* 248.

Where the defendant's possession was consistent with every existing claim, it was *Held*, that it "could be adverse to none." *Beach vs. Catlin*, 4 *Day's Rep.* 295. And to the like effect, *Vide Barr. vs. Gratz's heirs*, 4 *Wheat. Rep.* 213. *Fraser & Al. vs. M'Pherson & Al.*, 3 *Eq. Rep. (Dessauss.)* 408. *Witham vs. Perkins*, 2 *Greenl. Rep.* 400.

In the case of *Thayer assignee, &c. vs. Cramer & Al.*, (1 *M'Cord's Ch. Rep.* 395, 397.) THE COURT *per* NOTT, J. said; "In this case it is the Opinion of the Court that the decree of the Chancellor ought to be affirmed. Mrs. Gibbs is the only appellant, and the ground on which she relies is, that having been five years in possession she is protected by the Statute of Limitations. A mortgage of land in this state does not convey a fee, even after the time of redemption is past, the legal title still remains in the mortgagor, and the land is only considered as a

"pledge to receive the payment of the money. The mortgagor must therefore be considered as a trustee for the mortgagee, and cannot be considered as holding adversely. And a purchaser having a knowledge of the trust places himself in the same situation, making himself thereby a trustee. *Murray vs. Ballou*, 1 Johns. Cha. Rep. 575. 3 Vern. 271. 2 Fonbl. 152. The act requiring mortgages to be recorded was for the purpose of giving notice to creditors and subsequent purchasers. And as the mortgage in this case was recorded, we must consider the defendant as a purchaser with notice, and as holding subject to that incumbrance."

"The possession of the mortgagor, or those claiming under him, is not adverse to, but is compatible with, the rights of the mortgagee." The Statute of Limitations does not apply to such a case. *Higginson vs. Mein*, 4 Cranch's Rep. 419. & *Vide Jackson ex dem. Dox vs. Jackson*, 5 Cow. Rep. 174.

"No debtor, no mortgagor can set up an adverse possession against his creditor, or the mortgagee." (*Per DESAUSURE*, Ch.) *Fraser & Al. vs. MPherson & Al.*, 3 Eq. Rep. (*Desaus.*) 408.

The possession of the tenant for life is not adverse to, but consistent with the title of the reversioner in fee. *Banks, Admr. vs. Marksberry*, 3 Littell's Rep. 282.

In the case of *Kirk & Al. vs. Smith ex dem. Penn. In Error*, (9 Wheat. Rep. 241, 288.) MARSHALL, CH. J. delivered the Opinion of the Court; in speaking of "those rules which apply to Acts of Limitation generally," he said; "One of these, which has been recognized in the Courts of England, and in all others where the rules established in those Courts have been adopted, is, that possession to give title must be adversary. The word is not, indeed, to be found in the Statutes; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by Legislators and by Judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title. Several cases have been decided in this Court, in which the principle seems to have been considered as generally acknowledged; and in the State of Pennsylvania particularly, it has been expressly recognized. To allow a different construction, would be to make the Statute of Limitations a Statute for the encouragement of fraud—a Statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction."

Where two non-residents held in common an unsettled tract of land, which without their knowledge was sold for non-payment of

the state taxes; and they afterwards made partition by mutual deeds of release and quitclaim, in common form; after which one of them, within the time of redemption paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quitclaim to himself alone for the whole tract;—it was held that this payment and deed enured to the benefit of them both; that the party paying, had his remedy by action against the other for contribution; and that he who had not paid, might still maintain a writ of entry against the other, for his part of the land. *Williams vs. Gray*, 3 *Greenl. Rep.* 207.

Where a tenant by the curtesy of an undivided portion of an estate had abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was an ouster; it was held that the reversioner of such undivided portion of the estate had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy, his abandonment of the land being no forfeiture of the estate. *Witham vs. Perkins*, 2 *Greenl. Rep.* 400.

3d. "Where the party claiming possession, has never in contemplation of Law been out of possession."

This point is decided in *Barr vs. Gratz's Heirs*, 4 *Wheat. Rep.* 223. *Mather vs. The Ministers of Trinity Church & others*, 3 *Serg. & R. Rep.* 509. *Cluggage & others vs. Duncan's Lessee*, 1 *lb.* 118. *Proprietors of the Kennebeck Purchase vs. Springer*, 4 *Mass. Rep.* 418. & *Vide Gay vs. Moffit*, 2 *Bibb's Rep.* 508. *Green vs. Lister & Al.* 8 *Cranch. Rep.* 229. *Commonwealth vs. McGowan*, 4 *Bibb's Rep.* 62. *Chiles vs. Calk*, 4 *Ibid.* 554. *Harlock & Al. vs. Jackson*, 1 *Constit. Rep.* 135. & *Vide the Authorities cited in note [1.]* page 18. & *Bryant vs. Allen & Al.* 2 *Hayw. Rep.* 74. *Sawyer vs. —*, *Ibid.* 235. *Symonds vs. True Blood*, *Ibid.* 235. *Hord vs. Bodley*, 5 *Littell's Rep.* 88. *Smith & Al. vs. Morrow*, 5 *Littell's Rep.* 210. *Taylor vs. Shield's Heirs*, 5 *Littell's Rep.* 296. *Daniel vs. Ellis & Al.* 1 *Marsh. Rep. (Ky.)* 60. *Codman & Al. vs. Winslow*, 10 *Mass. Rep.* 151. *Commonwealth vs. Dudley*, 10 *Mass. Rep.* 408. *Wells vs. Prince*, 4 *Mass. Rep.* 64.

"He who makes title to a tract of land, and is in possession of part, is in possession of the whole according to the true limits and real position of the land." (*Per CHASE, J.*) *Ridgely's Lessee vs. Ogle & Al.*, 4 *Har. & M'Hen. Rep.* 129.

Possession of a part is a possession of all the land covered by a party's title. *Anderson ads. Darby*, 1 *Nott & M'Cord's Rep.* 369. *Brandon ads. Grimke*, *Ibid.* 357.

The seisin of lands belonging to the Indian tribes is in the Sov-

foreign, and the Indians are mere occupants. A purchaser from them can acquire only the Indian title, and they may resume it, and make a different disposition of it. An occupant under an Indian grant, the Indians having afterwards resumed the title, and granted it to the Crown, was held to be a tenant at will of the King, whose occupancy no length of time could ripen into a title by adverse possession. *Jackson ex dem. Sparkman vs. Porter*, 1 *Paine's Rep.* 458. & *Vide Cocke's Lessee vs. Dotson & Al.* 1 *Tenn. Rep.* 169. *Johnson vs. McIntosh*, 8 *Wheat. Rep.* 571, & *Seq. Fletcher vs. Peck*, 6 *Cranch. Rep.* 142. *Jackson ex dem. Klock & Al. v. Hudson*, 3 *Johns. Rep.* 384, 385.

Where one enters into land having title, his seisin is not bounded by his actual possession, but is co-extensive with his title. But where he enters without title, his seisin is confined to his possession by metes and bounds. *Jackson ex dem. Sparkman, vs. Porter*, 1 *Paine's Rep.* 458. & *Vide Cluggage & Al. vs. Lessee of Duncan*, 1 *Serg. & R. Rep.* 111. *Davidson's Lessee vs. Beatty*, 3 *Har. & M'Hen. Rep.* 621.

"It is a principle of law, that he who has title to a tract of land, and is in possession of part, is in possession of the whole. A person holding land cannot occupy and use every part of his land, nor can he have every part under fence.

"It is a principle of law, that if two persons are in possession of the same land, the one by title, and the other by wrong, it is his possession who has the right.

"These principles are not only established by the decisions of the Courts, and acquiesced in, but are founded in justice and general convenience, favour right, and resist wrong and oppression." (*Per CHASE, Ch. J.*) *Hammond vs. Ridgeley's Lessee*, 5 *Harr. & Johns. Rep.* 245. 264.

"Where two are in mixed possession of the same land, one by title and the other by wrong, the law considers him having the title as in possession to the extent of his right." (*Per BUCHANAN, J. delivering the Opinion of the Court.*) *Cheney vs. Ringgold & Al.*, 2 *Harr. & Johns. Rep.* 87. 94.

"Where two persons are in possession the one by right, and the other by wrong, it is the possession of him who is in by right." (*Per CHASE, Ch. J. delivering the Opinion of the GENERAL COURT.*) *Hall vs. Gitting's Lessee*, & *Gitting's Lessee vs. Hall*, 2 *Harr. & Johns. Rep.* 112. 115. This cause was carried to the COURT OF APPEALS, upon cross appeals by each party; and the COURT OF APPEALS, at December Term, 1807, affirmed the Opinion of THE GENERAL COURT, on both appeals, concurring in the Opinions pronounced in the several Bills of Exceptions. *Ibid.* 130.

Where surveys interfere, the Act of Limitations has no operation against him who has the best right, unless his opponent takes an adverse and exclusive possession. Where there is no interference, possession of part is possession of the whole. *Burns vs. Swift & Al.* 2 *Serg. & R. Rep.* 436.

"Although there may be a concurrent possession, there cannot be a concurrent seizin of lands: and one only being seized, the possession must be adjudged to be in him because he has the right." *Langdon vs. Potter & Al.* 3 *Mass. Rep.* 219. (*Per PARSONS, Ch. J. delivering the Opinion of the Court.*)

Where two persons are in possession of land, each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land. *Mather vs. The Ministers of Trinity Church & Al.*, 3 *Serg. & R. Rep.* 509.

"Where two are in possession of a tract or a house, it is his possession who has the right. (*Per CHASE, Ch. J. delivering the Opinion of the Court.*) *Davidson's Lessee vs. Beatty*, 3 *Har. & M'Hen. Rep.* 621.

"There would appear to be no clearer principle of reason and of justice, than this, that if the rightful owner is in the actual occupancy of a part of his tract by himself, or tenant, he is in the constructive and legal possession, and seizin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law, the possessor by wrong, would be more favoured than the rightful possessor. Here are two, each in actual possession and occupation, of part of a surveyed tract, the owner, and an intruder. Who then is in possession of the part not occupied by inclosure by either? The man who has no right but by disseisin of a part, or he, who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of mixed constructive possession, the legal seizin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the title." *Hall & Al. vs. Powell*, 4 *Serg. & R. Rep.* 465. (*Per DUNCAN, J. delivering the Opinion of the Court.*)

"According to Lord Holt, (1 *Salk.* 246,) a bare entry on another, without an expulsion, makes such a seizin only, that the law will adjudge him in possession that has the right." *Smith ex dem. Teller & Al. vs. Burtis & Al.*, 6 *Johns. Rep.* 218. (*Per KENT, Ch. J. delivering the Opinion of the Court.*) & *Vide Codman & Al. vs. Winslow*, 10 *Mass. Rep.* 151. *Commonwealth vs. Dudley*, *Ibid.* 408.

Where one conveyed lands in fee with general warranty, and a stranger at the same time was seized in fact of part of the same land by an elder and better title, the entry of the Grantee under his deed gives him seisin only of that part of which his grantor was seized;—but as to the stranger, the entry of the Grantee is a mere trespass. *Cushman vs. Blanchard & Al.* 3 Greenl. Rep. 266.

An adverse possession for twenty years, is not a bar to a Rector or Vicar, except as against the same incumbent who submitted to such possession. *Runcorn vs. Doe ex dem. Cooper, (In Error,)* 5 Barnew. & Cress. Rep. 696.

Where a part of a tract of land is included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not upon that included in both deeds, the possession of the part included in both conveyances, is in him whose deed or patent is the elder; but if one of them is actually settled for seven years together, upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby. *Doe & dem. Orbison vs. Morrison,* 1 Hawks Rep. 467.

The state by virtue of its prerogative is always seized of the lands to which it has title; and may therefore convey them by release, notwithstanding the intrusion of strangers upon them. *Hill vs. Dyer,* 3 Greenl. Rep. 441.

4th. "Where the possessor has acknowledged a title in the claimant."

The Defendant went into possession of land under *Gansevoort*, whom he supposed to be the owner of the soil; but afterwards believing that Mrs. Clark was the owner, he applied to her to purchase the land: after that application, Mrs. Clark conveyed the premises to *Viely*, who before bringing suit ordered the Defendant to leave the premises. Held, that the Defendant could not set up an adverse possession of twenty years; though he might shew that he made the application under a mistake, and prove a title out of the lessors of the Plaintiff. *Jackson ex dem. Viely & Clark vs. Cuerden,* 2 Johns. Cas. 353.

The declarations of a widow in possession of premises, that she held them for her life, and that after her death, they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years adverse possession. *Doe ex dem. Hyman vs. Pettitt,* 5 Barn. & Ald. Rep. 223.

And even where the predecessors of the Defendant, had acknowledged the title of the claimant, it was *Held* that the Defendant was equally precluded from setting up the defence of adverse possession. *Jackson ex dem. Van Schaick & others vs. Davis*, 5 *Cow. Rep.* 129, 130.

And to the same purport, *Vide Jackson ex dem. Griswold & Al. vs. Bard*, 4 *Johns. Rep.* 230. *Brandter ex dem. Fitch vs. Marshall*, 1 *Caines' Rep.* 394. *Rowletts vs. Daniel*, 4 *Munf. Rep.* 473.

"It has been decided, and is the settled law of the Country, "that a tenant shall not resist the recovery of his Landlord, by virtue of an adverse title acquired during his lease." *Lessee of Galloway vs. Ogle*, 2 *Binney's Rep.* 472. & *Vide Graham & Al. vs. Moore & Al.* 4 *Serg. & R. Rep.* 467.

Where the tenant of land for a year, held over, and after the expiration of his term paid rent to a stranger, and refused to quit the premises, being called upon by the agent of the lessor for that purpose; this was *Held* to be no *disseisin* of the lessor, not even at his election, nor such as would prevent the operation of a deed from the lessor to a third person. *Porter vs. Hammond*, 3 *Greenl. Rep.* 188.

Where A.'s tenant from year to year, takes a lease from B. the Act is void, and cannot work an adverse possession against A. *Jackson ex dem. Williams & Al. vs. Miller*, 6 *Cow. Rep.* 751.

"The repeated acts of the defendant, recognising the plaintiff's title by applications to purchase from him both before and after he entered into possession of the premises, afforded the strongest reason to presume that the defendant was in possession under *David Russell* [one of the lessors of the plaintiff.] We are accordingly of opinion that the plaintiff ought to have judgment." *Jackson ex dem. D. Russell & Al. vs. Croy*, 12 *Johns. Rep.* 430. (Per YATES, J. delivering the Opinion of the Court.) & *Vide Jackson ex dem. Brown & Al. vs. Ayers*, 14 *Johns. Rep.* 224.

If a stranger is in possession under or acknowledging the title of the devisee or remainder man it is equivalent to an actual entry. *Wells vs. Prince*, 4 *Mass. Rep.* 64.

A purchaser at a Sheriff's sale becomes *quasi tenant*, and it is not to be presumed that he holds adversely. *Jackson ex dem. Klein vs. Graham*, 3 *Caines' Rep.* 189. & *Vide Waring vs. Jackson ex dem. Eden & Al.* 1 *Peters Rep.* (Sup. Ct. U. S.) 570.

The possession of a defendant after a sale under an execution is not deemed adverse, for he becomes *quasi* a tenant at will to

the purchaser. *Jackson ex dem. Kanes vs. Sternbergh*, 1 *Johns. Cas.* 153. *Russell vs. Doty, Sheriff, &c.* 4 *Cow. Rep.* 576. & *Vide Langdon vs. Potter & Al.*, 3 *Mass. Rep.* 128.

One claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon the judgment. *Jackson ex dem. Scofield vs. Collins*, 3 *Cow. Rep.* 89.

(*But in M'Raa vs. Smith*, [2 *Bay's Rep.* 339.] It was Held ; That possession of land five years, under a sale from defendant, who has a judgment against him, will be a good bar against a judgment creditor or those claiming under him, who has lain by that time without reviving his judgment, or bringing suit against such possessor.)

In ejectment brought by *Duval* and *Younghusband* against *Bibb* for a tract of land, the jury found a verdict for the plaintiffs subject to the Opinion of the Court on a case which stated, that *Robert Bibb*, by deed dated the 13th of *December*, 1788, and recorded on the 16th of the same month, conveyed the land to *Graves*. That *Bibb*, was, at that time, in actual possession, and had been so for upwards of twenty years. That *Graves* on the 28th of *November*, 1793, conveyed to *Duval* and *Younghusband*. That there was no proof "that *Graves* was ever in actual possession, or ever entered upon the premises for the purpose of executing the last mentioned deed ; but that the defendant now, and always hath had adverse possession of the premises against the said *Graves* and all holding by or under him, except as to the operation of the deeds aforesaid."

PENDLETON, President, delivered the Opinion of the Court ; he said ;

"As to the twenty years possession in *Robert*, [*Bibb*,] prior "to his conveyance to *Graves*, it only proves that he had a good "title in ejectment, and a right to make that conveyance, and "cannot operate as a bar by the Act of Limitation to the plaintiffs "claiming under *Graves*, whose right of entry accrued only eight "years before suit brought."

"The third and principal question is, whether the bargain and "sale of *Graves*, (then out of possession) to the plaintiffs, passed "his title to them ? As an objection to its passing the title, the "Statute and Act of Assembly against buying pretended titles, "were relied on, as having in addition to the severe penalty on "the buyer and seller of the land, made the conveyance void. "It is unnecessary to consider whether those laws produced the "effect contended for, since we are all of opinion that the purchase of the plaintiffs is not within the Act of Assembly, which "has this exception : "Unless the person conveying, or those un-



"der whom he claims, shall have been in possession one whole year next before. [R. C. c. 103, §1, ed. 1819.] Here *Graves* was the person conveying, and *Bibb*, the person in possession was him under whom *Graves* claimed; so that, literally, *Bibb* is excluded from making the objection; and, if it depended upon construction, could the plaintiff possibly suppose, when they purchased, that *Bibb's* possession was adverse to the title of *Graves*, to whom he had conveyed the land with a general warranty?"

"The Court are therefore, of Opinion upon this point, that the title of *Graves* passed to the plaintiffs by the bargain and sale and gave them good title against *Bibb*: And upon the whole, that there is Error in the Judgment of the District Court which is to be reversed with costs, and judgment entered for the plaintiffs." *Duval & others vs. Bibb*, 3 *Call's Rep.* 366.

In the case of *Jackson ex dem. Dox vs. Jackson*, (5 *Cow. Rep.* 174.) *SUTHERLAND, J.* in delivering the Opinion of the Court, said:

"But it is perfectly immaterial whether *Jackson*, the mortgagor, was dead or alive. The defendant professed to derive all his title from him. He supposed him dead, and therefore claimed as his heir. But if he was alive, then the defendant was merely his tenant. In neither case could his possession be adverse to that of *Jackson*, on his mortgagee." & *Vide Higginson vs. Mein*. 4 *Cranch's Rep.* 419.

Where premises were mortgaged in fee, with a proviso for conveyance, if the principal were paid on a given day, and in the mean time that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had, or had not been paid by the mortgagor: *Held*, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee; and consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgage was not barred by the Statute of Limitations; *Held also*, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hall vs. Doe ex dem. Surtees & Al.*, 5 *Barn. & Ald. Rep.* 687.

In the case of *Pender vs. Jones*, (2 *Hayw. Rep.* 294.) *TAYLOR, J.* said; "I am of opinion, that a deliberate avowal on the part of the possessor, of title in the claimant, or a serious assent to the validity of his title, will render an entry or claim unnecessary, and is equivalent in its effects to an entry or claim."

But where a *Bona fide* purchaser from a mortgagor, entered, without notice of the mortgage, (which was not registered till af-

ter the commencement of the ejectment suit,) and he and those claiming under him, had "been in the continued possession of the "premises under a colour of title for more than seven years," it was held a sufficient adverse possession to bar the mortgagee, or any claiming under him, from recovering in ejectment. *Baker vs. Evans*, 2 N. Car. Law Rep. 614, 616.

"Neither a mortgagor nor his assignee can hold adverse possession to the mortgagee, unless the assignee has taken a conveyance without notice, otherwise they are mere tenants at will." *Newman vs. Chapman*. 2 Rand. Rep. 93.

If a defendant has acknowledged the title of the plaintiff, he cannot afterwards dispute it. *Jackson ex dem. Low & Al. vs. Reynolds*, 1 Caines' Rep. 444.

But where the lessors proved no seisin or title in themselves, and relied upon proof of an agreement by the person in possession to take a lease from them, but there was no proof that any lease was ever executed or any rent paid, and the defendant claimed to hold adversely, and shewed a title in third persons, the Court after stating these facts, added, "It does not appear that the defendant was put into possession by the lessors, or that he ever paid them any rent. The defendant must have judgment." *Jackson ex dem. Southampton & Al. vs. Cooley*, 2 Johns. Cas. 223.

And where A. in the year 1779, as the tenant of B. and by his directions entered into the premises in question and took possession, which was regularly continued down to the defendant; and B. at the time wrote to C. (who also claimed the premises, as lying on his, C.'s side of the division line,) that he, (C.) was mistaken in supposing the land to be his own; but that when the times became more peaceable he, B. and C. would have the land surveyed, and if the land did belong to C. then A. should pay him rent, &c. It was held that this letter merely suspended the operation of the Statute of Limitations during the War; and that there having been more than twenty years adverse possession under B.'s title since 1783, C. could not recover. *Jackson ex dem. Brett & Al. vs. Hunt*. 6 Johns. Rep. 16.

The purchaser of lands sold for the non-payment of taxes, holds adversely to the former owner; consequently can avail himself of 20 years adverse possession. *Graves vs. Hayden*, 2 Littell's Rep. 61.

Neither cases of trust nor fraud, are within the Statute of Limitations.

"This is a trust estate, against which the limitation does not run 'or operate.'" *Gist & Al. Representatives, &c. vs. Heirs, &c. of Cattell*, 2 Equity Rep. (Dessauzsure) 55. & *Vide West vs. Randall & Al.* 2 Mason's Rep. 203.

"It is equally said that fraud as well as trust is not within the 'Statute.'" *Kane vs. Bloodgood*, 7 Johns. Ch. Rep. 122. (Per KENT, Ch.) & *Vide Exors. of Hunter & Al. vs. Spotswood*, 1 Wash. Rep. 145.

A purchaser for a valuable consideration, if affected with notice, becomes a Trustee for the true owner, and will not be protected by the Statute of Limitations. *Wamburzee & Al. vs. Kennedy & Al.* 4 Eq. Rep. (Dess.) 474. & *Vide Thayer, Assignee, &c. vs. Cramer & Al.* 1 M'Cords Cha. Rep. 395, 398.

As a rule the Statute of Limitations does not operate in cases of fraud and of trusts; but as soon as the fraud is discovered it commences to run; *Wamburzee & Al. vs. Kennedy & Al.*, 4 Ex. Rep. (Dess.) 479. *Sweat vs. Arrington, Admr. &c.* 2 Hayw. Rep. 129.

The Statute of Limitations "does not reach to matters of direct trust, as between trustee and *cestui que trust*." *Coster & Al. vs. Murray*, 5 Johns. Ch. Rep. 531. *Turner & Al. Exors. vs. Debell, Exor.*, 2 Marsh Rep. (Ky) 384.

Nor to parties standing in the relation of principal and agent, or factor. 5 Johns. Ch. Rep. 531.

It is a settled rule, that the Statute of Limitations cannot, either in a Court of Law, or Equity, protect a trustee against the demands of his *Cestui que trust*. *Thomas vs. White & Al.*, 3 Littlell's Rep. 177, 181.

Trustees cannot urge the lapse of time against the *Cestui que trust*. *Trustees of Lexington vs. Heirs of Lindsay*, 2 Marsh. Rep. (Ky.) 445.

A trustee cannot take advantage of the Act of Limitations, against the claim of the *Cestui que trust*, or of persons claiming under him. *Redwood vs. Riddick & Uz.* 4 Munf. Rep. 222.

"So long as the trust subsisted, so long it was impossible that 'the *Cestui que trust* could be barred. The *Cestui que trust* could 'only be barred by barring and excluding the estate of the trustee.'" *Cholmondeley vs. Clinton & Al.* 2 Meriv. Rep. 360.

Land was devised to A. in trust to apply the rents and profits to the support of B. during his life, and in an action by the *Cestui*

*que trust* against the trustee to recover the rents and profits, it was held, that the general Statute of Limitations does not apply to trusts. *Hemenway vs. Gates, Administrator, &c.* 5 *Pick. Rep.* 321.

"It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a Court of Equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption in favour of innocence, and against imputation of fraud." *Prebost vs. Gratz & Al.*, 6 *Wheat. Rep.* 497, 498. (PER STORY, J. delivering the Opinion of the Court.)

A legacy or trust is not within the Statute of Limitations; but after a length of time payment will be presumed; yet such presumption may be rebutted by other circumstances; and what operation they should have is for the consideration of the jury. *Durdon, Exor. &c. vs. Gaskill*, 2 *Yeates' Rep.* 268, 271.

In the case of *Van Rhyn vs. Vincent's Executors*, (1 *M'Cord's Ch. Rep.* 310, 313.) THE COURT, per NORT, J. said; "For although it is a rule in the Court of Equity that lapse of time will be no bar between a trustee and a *Cestui que trust*, yet that doctrine applies only to technical equitable trusts, and not to those constructive trusts of which a Court of Law as well as a Court of Equity have jurisdiction."

If a *Bona fide* purchaser, without notice, but who is a trustee by implication, is to be affected by an Equity, that Equity must be pursued within a reasonable time. *Shaver & Al. vs. Radley & Al.*, 4 *Johns. Ch. Rep.* 310. & Vide *Thompson & Uz. & Al. vs. Blair & Al.*, 3 *Murph. Rep.* 583.

"A trustee cannot avail himself of the Act of Limitations; and it requires plain, strong and unequivocal proof of his renunciation of the trust to divest himself of it for the purpose of benefiting himself by the Act of Limitations, to destroy the rights and interests of the *cestui que trust*. Length of possession is the strong fact on which the presumption was prayed. The possession is accounted for by the proof, which shows how it was acquired by *Darnall*, how continued, and how transmitted to his representatives, not inconsistent with his moral duties, his probity or honour, nor in derogation of the rights and

"interests of the creditors and legal representatives of *J. Fishwick*, but for the preservation of the property for the benefit of her creditors and legal representatives. And by this proof is the presumption most conclusively repelled." (*Per CHASE, CH. J. delivering the Opinion of the Court of Appeals*,) 4 *Harr. & Johns. Rep.* 430. [This was not a case of direct trust, but of trust by implication, or construction of law.]

"It is true, the Statute of Limitations cannot be pleaded against a breach of trust, nor can a person who has taken a conveyance from the trustee shelter himself under a plea of that Statute." *Boteler vs. Allington*, 3 *Atk. Rep.* 459. (*Per HARDWICKE, LORD CHANCELLOR.*)

The possession of the *cestui que trust*, is not adverse to the title of the trustee. *Smith ex dem. Dennison & Al. vs. King & Al.*, 16 *East's Rep.* 283. & *Vide Keene, ex dem. Lord Byron & Al. vs. Deardon & Al.*, 8 *East's Rep.* 248. *Sir William Smith vs. Wheeler*, 1 *Ventris' Rep.* 129.

*Cestui que trust*, is "tenant at will" to the Trustee, and the possession of the *cestui que trust* is "the very possession, in consideration of law of the trustees." *Earl of Pomfret vs. Lord Windsor*, 2 *Ves. Sen'r. Rep.* 481. & *Vide to the same purpose Lethieullier vs. Tracy*, 3 *Atk Rep.* 729, 730.

*Cestui que trust*, is tenant at will to his trustee, and his possession is the possession of the trustee. *Dighton vs. Greenvil. (In Error.)* 2 *Ventris' Rep.* 329.

And it is a maxim that no conveyance by *cestuy que trust*, can work a forfeiture of the legal estate of the trustee, it has been held that a fine or other alienation by *cestuy que trust* for life, does not work a forfeiture of his life estate. *Sanders on Uses*, 201.

In the case of *Lethieullier vs. Tracy*, (3 *Atk. Rep.* 729, 730.) *HARDWICKE, LORD CHANCELLOR*, said; "I will suppose for argument's sake, that Mrs. Tracy had levied a *fine sur concessit* of her estate for life; yet as it is a trust estate, and there are limitations to trustees to preserve contingent remainders, I am of opinion that it does not work a forfeiture of her estate for life, because it cannot at all hurt or affect the subsequent remainders, as there are trustees under the will to preserve them, and therefore such a fine would in Equity operate at most as a grant only of such interest as she had a power to grant."—"A Court of Equity will never construe such a fine to work a wrong, but it operates only on the trust to preserve the contingent remainders, and not on the legal estate; for *Lord Talbot* in the case

"of *Hoskins and Hoskins*, and myself in a cause that came before me afterwards, were of opinion, that a person so intrusted "laying a fine creates no wrong, but operates so as to grant all "the comor had a power to grant."

The rule that trust and fraud are not within the Statute of Limitations, is subject to this modification, that if the trust be constituted by the act of the parties, the possession of the trustee, is the possession of the *cestui que trust*, and no length of such possession will bar; but if a trust be constituted by the fraud of one of the parties, or arises from a decree of a Court of Equity, or the like, the possession of the trustee becomes adverse, and the Statute of Limitations will run from the time the fraud is discovered. *Thompson & Uz. & Al. vs. Blair & Al.*, 3 *Murph. Rep.* 663. & to the like purport vide *Van Rhyne vs. Vincent's Ex'ors.*, 1 *McCord's Ch. Rep.* 314.

An executor entering on Lands of the estate of his testator and occupying them, is to be considered as holding them in trust for the heirs or devisees, unless he proves that he held adversely with notice to the heirs or devisees; in which case, the proof lies on him to establish the claim at law, on an issue directed. *Ramsay & Uz. vs. Deas' Ex'or. &c.* 2 *Eq. Rep. (Dess.)* 233.

The Statute of Limitations is not allowed to run in favour of a man who was employed to act as agent, but purchased for himself: He is considered as a trustee; and his employer shall be entitled to the benefit of the purchase. *Hutchinson vs. Hutchinson*, 4 *Eq. Rep. (Dess.)* 77.

In the case of *Lessee of Bell vs. Levers*, (3 *Yeates' Rep.* 26.) SHERRIN, CH. J. in his charge to the Jury said; "As to the survey "said to have been made by *John Seely* for his own use in 1772, "there is abundant ground to believe that it was not then made, "and that it was improperly foisted into the office. He knew that "he had made the survey for *Levers*, and at his expense; and as "he could gain no title by his villainy and breach of trust, so neither could he communicate any to *Towers*, by his conveyance of "the 19th May, 1775."

In the case of *Starr vs. Starr & Al.*; (2 *Ohio Rep.* [*Hamm.*] 321, 326.) THE COURT said; "That this trust was not formally "declared or expressed between the parties, is no reason why it "cannot exist. The law is not to be evaded by contrivances of "this nature. A trust tacitly created is more difficult to reach "than one that is expressed; but where it is ascertained, the same "consequence is attached to it."

The general rule is, that after a sale of land, and before a con-

veyance of the legal title, the Vendor is the trustee of the Vendee, and the Act of Limitations will have no operation. But where the Vendor disavows the trust, and after having delivered possession to the Vendee, makes a lease to a third person in opposition to the title of the Vendee, and the lessee enters and holds possession, the jury may presume a disseisin; and if the Vendee suffers twenty-one years to elapse without prosecuting his claim, it will be barred by the Act of Limitations. *Pipher & Al. vs. Lodge*, 4 Serg. & R. Rep. 310.

But, to prevent length of time from barring a claim, on the ground that the possession of the defendant was *fiduciary*, such possession must have been *fiduciary as to the plaintiff or those under whom he claims*: it's being fiduciary as to any other person, is not sufficient. *Spotswood vs. Dandridge & Al.* 4 Hen. & Munf. 139.

Statutes of Limitations do not extend to cases of fraud; nor can any act or deed which is fraudulent be the foundation of an adverse possession; because, being absolutely *void*, and not merely *voidable*, it cannot afford *colour* of title; and without *colour* of title, there is nothing whereby an *adverse possession* can be sustained.

The common Law of England abhors every species of covin and collusion." *Roberts' on Fraud. Conv.* 520, Ch. 5. Sect. 1.

"So general, indeed, is the condemnation of all fraudulent acts by the Law of England, that a fraudulent estate is said in the masculine language of the books, to be no estate in the judgment of the Law. It forfeits the protection of every Statute which gives confirmation to doubtful titles, and while a disseisor has the benefit of the Statutes of Fines and Limitations in support of his wrongful title, a title acquired by covin is indefinitely open to be disputed, and even acts, as well *judicial* as others, which of themselves are just and lawful, if infected with fraud, are in judgment of Law vitious and unavailing; for the maxim is *quod alias bonum et justum est, si per fraudem petatur, malum et injustum efficitur*. All the partialities of the Law expire under its antipathy to Fraud." *Ibid.*

"According to the greatest authorities, a *covinous conveyance* of Land is as no conveyance *as against* the interest intended to be defrauded, and ought, by the rules of good pleading, so to be treated, where a party is seeking to avail himself of the protection of the Statutes of Fraudulent conveyances, for the maxim is "*pro possessore habetur qui dolo desit possidere*." *Ibid.* 596.

Length of time may bar an Equity; twenty years possession bars an Equity of redemption; but no time can cover a fraud. "It is true that in cases of fraud no time can cover the fraud." *Pickering vs. Lord Stamford*, 2 Ves. Juh. 280.

A title in whatever manner perfected, if obtained by Fraud is void. *Galatian vs. Erwin*, 1 *Hopkins' Ch. Rep.* 48, 65. *Smithwick & Al. vs. Jordan*, 15 *Mass. Rep.* 113. *Jackson ex dem. Gilbert vs. Burgott*, 10 *Johns. Rep.* 457, 461. *Brooks vs. Marbury*, 11 *Wheat. Rep.* 90. *Livingston vs. Hubbs & Al.*, 2 *Johns. Ch. Rep.* 512. *Boyd vs. Dunlap*, 1 *Johns. Ch. Rep.* 482. *Wendell vs. Van Rensselaer*, *Ibid* 350. *Bright, Ex'or. vs. Eynon*, 1 *Burr*, 395. *Gubbins vs. Creed*, 2 *Sch. & Lefr.* 223. *Carew vs. Johnston*, *Ibid* 307. *Kennedy vs. Daly*, *Ib.* 355, 375, 379, 380. *Giffard vs. Hort*, 1 *Ib.* 386, 409.

"In *Fermor's Case*, (3 *Co.* 77.) it was resolved that a fine levied by Fraud was not binding, "and that such fraudulent estate was "as no estate in judgment of Law," and it was declared that all "act and deeds, judicial as well as extra judicial, if mixed with "fraud were void." *Jackson ex dem. Gilbert vs. Burgott*, 10 *Johns. Rep.* 463. (*Per KENT*, CH. J. *delivering the Opinion of the Court.*)

Fraud will vitiate any contract. *Willson vs. Foree*, 6 *Johns. Rep.* 110. *Whelan vs. Whelan* 3 *Cow. Rep.* 537. *Seymour vs. Delancey*, 3 *Cow. Rep.* 445. *Murray vs. Palmer*, 2 *Sch. & Lef.* 474. *Bliss & Al. vs. Thompson*, 4 *Mass. Rep.* 488. *Carroll & Al. vs. the Boston Marine Insurance Company*, 8 *Ibid* 515.

"The other question is, whether the defendant can protect himself by the possession of fifteen years under the Statute concerning the possession of Lands. It is unnecessary to consider the question whether fraud will take the case out of the Statute; for I apprehend, on a sound construction, it will be found neither "to be embraced by the words, nor comprehended within the "meaning of the Statute; and it would be a new idea to construe "a Statute liberally for the protection of Fraud." *Beach vs. Catlin*, 4 *Day's Rep.* 294. (*Per SWIFT*, J.)

"It is generally true that a man shall not be received to aver against his own deed. But the case of fraud is always excepted which vitiates every transaction: and a deed obtained by fraud is to be considered as a void contract as to the fraudulent party." *Bliss & Al. vs. Thompson*, 4 *Mass. Rep.* 492.

And in the case of *Kirk & Al. vs. Smith ex dem. Penn. In Error*, (9 *Wheat. Rep.* 241, 288) MARSHALL, CH. J. *delivered the Opinion of the Court*; in speaking of "those rules which apply



"to *Acts of Limitation generally*," he said; "One of these, which has been recognized in the Courts of England, and in all others where the rules established in those courts have been adopted, is, that possession to give title must be *adversary*." And he added; "To allow a different construction, would be to make the Statute of Limitations a Statute for the encouragement of fraud—a Statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction."

And it matters not, whether a fraud be committed against a party to the fraudulent transaction, or against third persons, not parties thereto.

An agreement may be infected with fraud by being a deceit on other persons not parties to that agreement. "Particular persons in contracts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect of other persons, who stand in such a relation to either as to be affected by the contract or the consequences of it." *Earl of Chesterfield & Al. vs. Sir Abraham Jansen*, 3 Ves. Sen. Rep. 156. & *Vide Whelan vs. Whelan*, 3 Cow. Rep. 537.

"Whether a transaction be fair or fraudulent, is often a question of Law: it is the Judgment of Law, upon facts and intents. The *Indemnity*, which is the consideration of the deed in question, I allow to be a good, valuable, and true consideration: and I allow this deed to be a valid transaction, as between the parties. But valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy to injure a third person: for instance—A. buys an estate from B. and forgets to register his purchase deeds: if C. with express or implied notice of this, buys the estate for a full price, and gets his deeds registered: this is fraudulent, because he assists B. to injure A. Or, if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods, for a full price, to enable him to defeat the creditor's execution; it is fraudulent. Again, if a man knowing that an executor is wasting and turning the testator's estate into money, the more easily to run away with it, buys from the executor, with that view, though for a full price; it is fraudulent." *Sir Edward Worsley & Al., assignees &c. vs. De Mattos & Slader*, 1 Burr. Rep. 474. (Per LORD MANSFIELD, delivering the Opinion of the Court.)

Nor is the investigation of fraud, exclusively confided to Courts of Equity; Courts of Law have, also, jurisdiction in such cases. The difference is, that at Law fraud must be proved; in Equity it may be presumed.

"Courts of Equity, and Courts of Law, have a concurrent jurisdiction, to suppress and relieve against *Fraud*. But the interposition of the former, is often necessary for the better investigating truth, and to give more complete redress." *Bright, Ex'or. &c. vs. Eynon*, 1 *Burr. Rep.* 396. (Per LORD MANSFIELD,) & *Vide* 3 *Blac. Comm.* 431, 437, 439: *Boreing vs. Singery*, 3 *Har. & M'Hen. Rep.* 404.

"With respect to fraud, the distinction between legal and equitable jurisdiction is this: that at law it must be proved, not presumed; so that equitable jurisdiction may be exercised, when a court of law could not enter into the question. (18 *Ves.* 483.) A variety of cases, have been decided, and relief afforded in Equity, where from the nature of the transaction, and the situation of the parties, fraud and imposition might be presumed. (3 *P. Wm.* 139. *Pow. on Con.* 31.)" *Galatian & Al. vs. Cunningham*, (On Appeal,) 8 *Cow. Rep.* 370. (Per WOODWORTH, J.)

"Courts of law as well as of equity have cognizance of fraud but Courts of law relieve against it negatively, by inquiring into circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties." *Lamborn vs. Watson*, 6 *Harr. & Johns. Rep.* 252, 255. (Per BUCHANAN, CH. J. delivering the Opinion of the Court.)

"Fraud will invalidate in a Court of Law, as well as in a Court of Equity, and annul every contract and every conveyance infected with it," *Jackson ex dem. Gilbert vs. Burgott*, 10 *Johns. Rep.* 462. (Per KENT, CH. J. delivering the Opinion of the Court.) & *Vide Bright, Ex'or. vs. Eynon*, 1 *Burr. Rep.* 397. *Beach vs. Catlin*, 4 *Day's Rep.* 293. *Merrill vs. Meachum*, 5 *Day's Rep.* 344.

"Fraud will invalidate in a Court of Law as well as in a Court of Equity. We all remember the case of *Wyndham v. Chetwynd*, P. 1775. 28 G. 2. in this Court: where the Court directed the Jury to find "*non devisavit*," though there was a devise in fact; but it was obtained by fraud, and therefore considered as no devise at all." *Bright, Ex'or. &c. vs. Eynon*, 1 *Burr. Rep.* 397. (Per FOSTER, J.)

A person claiming under the grantor of a deed, but claiming against the deed, is not precluded from showing that it was obtained by fraud. BUCHANAN, CH. J., in delivering the Opinion of the Court, said; "The whole of the evidence set out in the third bill of exceptions, was expressly offered for the purpose of showing, that the deed from *Zachariah and Harriet Tucker* to

"*Soper*, the defendant, was fraudulently obtained, and was all "suffered to go to the Jury, as the proper tribunal to determine "the question of fact." *Hurn's Lessee vs. Soper*, 6 *Harr. & Johns. Rep.* 276, 281.

Statutes of Limitations, only take place from the time the right of action accrues; and if there be fraud, from the time of its discovery. *Jones vs. Conoway & Al. Ex'ors. &c.* 4 *Yeates' Rep.* 109.

In the case of *Riddle vs. Murphy & Al.*, (7 *Serg. & R. Rep.* 235.) *Gibson*, J. *delivering the Opinion of the Court*, said; "The Court, very properly charged, that if the sale was fraudulent, the act began to run against the devisees of *Cornelius Murphy*, or those who represented them, only from the time the "fraud became known to the person then having the title."

But a *Bona fide* purchaser for a valuable consideration from a fraudulent grantee, if unaffected with notice either actual or constructive, will, at Law, be protected. *Dexter vs. Harris*, 2 *Mason's Rep.* 536. In this case *Story*, J. *delivering the Opinion of the Court*, said; "There is no such principle of Law, as that what "is matter of record shall be constructive notice to a purchaser. "The doctrine upon this subject as to purchasers is this, that they "are affected with constructive notice of all, that is apparent upon the face of the title deeds, under which they claim, and of "such other facts as those already known necessarily put them "upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of "other facts extrinsic of the title, and collateral to it, no constructive notice can be presumed; but it must be proved."

It seems, that the Statute of Limitations, in regard to real actions, does not apply to actions of dower *Hitchcock & Uz. vs. Harrington*, 6 *Johns. Rep.* 290. *Jones vs. Powell & Al.*, 6 *Johns. Ch. Rep.* 194.

Where husband conveys without the wife joining in the conveyance, the Statute of Limitations does not begin to run against her right of dower, until the death of the husband. *Culler & Al. vs. Motzer*, 13 *Serg. & R. Rep.* 356.

The Statute of Limitations runs against dower, *Mitchell vs. Poyas*, 1 *Nott & M'Cord's Rep.* 85. *Ramsay vs. Dozier*, 1 *Const. Rep. So. Ca.* 112.

In a case of conflicting claims for a patent for vacant lands under the land laws of North Carolina, (*Mac Neil vs. Lewis*, 3 *N. Car. Law Rep.* 80, 82.) *SEAWELL*, J. *delivering the Opinion of*

*the Court*, said "None of our Acts of Limitation can have any influence, whether with or without colour of title, for they are "bottomed upon the presumption that a grant once existed, but "has been lost; but in the case of a caveat, both parties admit "the Land to be vacant, but are disputing as to whom a title *shall* "be made."

And where the party having title, has lost the right of possession by lapse of time, yet if he can afterwards peaceably obtain the possession, such possession will be protected by his title.

In the case of *Doe ex dem. Burrough & Barbara his wife vs. George Reade*; (8 East's Rep. 353.) which was an ejectment brought to recover the possession of certain copyhold premises; a copy of the court roll was produced, dated the 24th of October, 1735, whereby *George Reade*, the grandfather of the defendant and of *Barbara*, the lessor, took the premises in question, to hold to him and his sons *G. G. Reade* and *W. Reade* successively, during their lives, and the life of the longest liver. On the 13th of January, 1777, (*G. G. Reade*, the eldest son, being dead, (*W. Reade*, he then having issue the defendant *George Reade*, and the lessor *Barbara*, purchased by copy of that date the reversion of the said premises, on the determination of the estate of *G. Reade*, the grandfather, and of his own estate for life therein; to hold to the defendant *George*, his son, then an infant, during his natural life; and the defendant was thereupon admitted to the same. On the 19th of January, 1786, *W. Reade* surrendered his own life estate and the reversionary estate of the defendant *George*, his son, then a minor, and took another grant of the lord by copy of that date, to hold to himself, the lessor *Barbara*, and the defendant *George* successively; and was admitted thereon. *W. Reade* continued in possession until his death on the 28th of March, 1806, whereupon the defendant entered. The jury found for the plaintiff; and upon showing cause by the plaintiff against a new trial, he insisted that, "If the defendant's right of entry were ousted, as it was, so that he could not have maintained ejectment, it cannot vary the question that he got into possession after the 20 years adverse possession had run against him, which had transferred the possessory right to the lessor." But LAWRENCE J. said, "This reasoning might have applied, and the difficulty would have existed, "if *George Reade* had been now a plaintiff instead of a defendant "in ejectment; and were contending against any person who had an "adverse possession against him: but possession has *Barbara Burrough* [*Burrough*] against him? She is in effect a stranger to the "estate, having no present title, and can have no right to recover "in ejectment against one who is admitted to have the legal title, and "is also in possession. The question might have arisen in the life "time of *Wm. Reade*, the father, after 20 years adverse possession by "him: but upon his death, there being no person in possession, there

"was nothing to hinder the defendant from asserting his right by entering peaceably into a vacant possession; and now he has both the legal title and the possession," And "THE COURT all agreed, that the defendant, being lawfully in possession, might defend himself upon his title, though 20 years had run against him before he took possession; such 20 years possession not being the possession of the lessor of the plaintiff."

But it is otherwise in the case of the grantee of a person *disseised*; "It is one of the first principles of the law applicable to real estate, that he who is disseised cannot during the continuance of such disseisin convey to a third person. If he attempts to convey, nothing passes by the deed. If the supposed grantee enters, he is a trespasser, and having gained possession by his own tortious act he cannot avail himself of his deed to render his continuance in possession lawful." (PER PREBLE, J. *delivering the Opinion of the Court.*) *Hathorne vs. Haines*, 1 *Greenl. Rep.* 247. & *Vide Cushman vs. Blanchard & Al.*, 2 *Greenl. Rep.* 266.

"If the owner of a parcel of land through inadvertency or ignorance of the dividing line, includes a part of an adjoining tract within his inclosure, this does not operate a disseisin, so as to prevent the true owner from conveying and passing the same by deed." *Brown vs. Gay*, 3 *Greenl. Rep.* 126, 130. (PER WESTON, J. *delivering the Opinion of the Court.*)

Where a legal title to hold land is disclosed to the court, the party shall not be permitted to say he holds by wrong. *Tinkham vs. Arnold*, 3 *Greenl. Rep.* 120.

Having seen in what cases an adverse possession cannot be admitted, the next inquiry will be, What is necessary to constitute an effectual adverse possession, in cases where it can be set up as a defence? And since this inquiry cannot be rationally and satisfactorily answered without a knowledge of the object and intent of the Statute of Limitations, the opinions of the Superior Courts of Law and Equity as to the meaning of those Statutes, are peculiarly worthy of attention.

"The object of the law [*the Statute of Limitations*] is to secure the individual from the machinations of dishonesty when attempted under the advantages attendant upon lapse of time, loss of papers, and death of witnesses. But when cases present themselves in which no laches can be imputed to the plaintiffs, but great injustice would be done by applying to such cases the effect of the Statute, the conclusion of Reason and of the Law is that such cases were not in the mind of the Legislature when enacting that law. Such are the cases of a want of par-

"ties, plaintiff or defendant, whereby a temporary suspension of legal remedy takes place. But in no case of a voluntary abandonment of an action, has an exception to the Statute of Limitations been supported." *Richards & others vs. The Maryland Insurance Company*, 8 *Cranch's Rep.* 92, 93. (Per *JOHNSON*, J. *delivering the Opinion of the Court.*)

So in the case of *Robinson vs. Campbell*, (3 *Wheat. Rep.* 224.) *TONN*, J. *delivering the Opinion of the Court*, said; "The last question is, whether the Statute of Limitation of Tennessee was a good bar to the action. It is admitted, that it would be a good bar only upon the supposition that the lands in controversy were always within the limits of Tennessee; but there is no such proof in the cause. The compact of the states [*Virginia and Tennessee*] does not affirm it, and the present boundary was an amicable adjustment by that compact. It cannot, therefore, be affirmed by any Court of Law, that the land was within the reach of the Statute of Limitations of Tennessee until after the compact of 1802. The Statute could not begin to run until it was ascertained that the land was within the jurisdictional limits of the state of Tennessee."

The Statute of Limitations is suspended during war, as to alien enemies. *Ogden vs. Blackledge*, 2 *Cranch's Rep.* 272.

A war suspends the operation of the Statute of Limitations between the citizens of the two countries, for the time during which it continues. *Wall, Ads. Robson*, 2 *Nott & M'C. Rep.* 498:

"The Statute of Limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under colour of a title believed to be good." *McIver & Al. vs. Ragan & Al.* 2 *Wheat. Rep.* 29. (Per *MARSHALL*, Ch. J. *delivering the Opinion of the Court.*)

And in the case of *Den ex dem. Jones vs. Ridley*, (2 *N. Car. Law Rep.* 400.) *TAYLOR*, Ch. J. *delivering the Opinion of the Court*, said; "But a possession for this period can only meet the spirit and design of the law, [*the Statute of Limitations*], when it is unbroken and uninterrupted; for as it is founded on the supposition that the possessor really believes he has title, this idea is weakened rather than confirmed, by his occasionally withdrawing from the possession, and leaving the land without cultivation, without occupancy, and without a tenant."

"It must be, as I understand the law, such a title as the law will *prima facie*, consider a good title." *Jackson ex dem. Ten*

*Eyck & Al. vs. Frost*, 5 Cowen's Rep. 351. (Per SAVAGE, Ch. J. delivering the Opinion of the Court.) & *Vide Francoise vs. De La Ronde*, 8 Martin's Rep. 619. *Bonne & Al. vs. Powers*, 3 Martin's Rep. (N. S.) 458.

"The truth is, that the Statute [of Limitations,] was never intended as a means of acquiring title, or as an encouragement to people to enter on each other's land with a view to hold it; but to compel them to decide their controversies while transactions are recent and the evidence of them is attainable; and there its operation in protecting a possession under a bad title, or no title at all, is but a consequence of the object of its enactment, and not the object itself." *Miller & Al. vs. Shaw*, 7 Serg. & R. Rep. 138. (Per GIBSON, J.)

"Statutes of Limitations relate to the remedies which are furnished in the Courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance." *Sturges vs. Crowninshield*, 4 Wheat. Rep. 207. (Per MARSHALL, Ch. J. delivering the Opinion of the Court.)

"Every Statute of Limitations, being in restraint of right, must be construed strictly." *Pease vs. Howard*, 14 Johns. Rep. 480. (Per VAN NESS, J. delivering the Opinion of the Court.)

To constitute a valid and effectual adverse possession, it is necessary,

1st. That it be commenced under colour and claim of title;

"To constitute an adverse possession, there must be a possession under colour and claim of title."—"It has never been considered as necessary to constitute an adverse possession, that there should be a rightful title." *Smith ex dem. Teller & Al. vs. Burris & Al.* 9 Johns. Rep. 179, 180. SAME POINT, *Jackson ex dem. Roosevelt vs. Wheat*. 18 Johns. Rep. 40. *Jackson ex dem. Vanderlyn & Betts vs. Newton & Al.* 18 Johns. Rep. 355. *Jackson ex dem. Gansevoort & Al. vs. Parker*, 3 Johns. Cas. 124. *Jackson ex dem. Young & Al. vs. Ellis & Al.* 13 Johns. Rep. 118. *Jackson ex dem. Swartwout & Uz. vs. Johnson*, 5 Cow. Rep. 92. *Jackson ex dem. Ten Eyck & Al. vs. Frost*, 5 Cow. Rep. 350. *Jackson ex dem. Young & Al. vs. Camp*, 1 Cow. Rep. 609. *Jackson ex dem. Gilliland & Al. vs. Woodruff & Al.* 1 Cow. Rep. 285. & *Vide Seymour vs. DeLancey & Al.* 1 Hopk. Rep. 448. *Jackson ex dem. Gansevoort & Al. vs. Lunn*, 3

*Johns. Cas.* 115. 117. *Jackson ex dem. Hasbrouck vs. Vermilyea*, 6 *Cow. Rep.* 680.

Seven years possession without a colour of title, is not sufficient to bar the Plaintiff in Ejectment. *Stanley vs. Turner*, *Cam. & N. W. Rep.* 545. *Same Case*, 2 *Hayw. Rep.* 336. & *Vide Anonymous Case*, 2 *Hayw. Rep.* 134. *Den ex dem. Jones vs. Ridley*, 2 *N. Car. Law. Rep.* 399. *Den ex dem. Stanley vs. Turner*, 1 *Murph. Rep.* 14. *Den ex dem. Midford & Ux. vs. Hardison*, 3 *Murph. Rep.* 166.

"Adverse possession, is a possession under colour and claim of "title. 9 *Johns. Rep.* 179, 180." *Rogers vs. Hillhouse*, 3 *Connect. Rep.* 403.

"The Act of Limitations ripens no possession into title, which is unaccompanied with a colour of title." *Borretts vs. Turner*, 2 *Hayw. Rep.* 114. — *vs. Ashe*, *Ibid.* 104. *Armour vs. White*, *Ibid.* 69. *Grant vs. Winborne*, *Ibid.* 57. *Anonymous*, *Ibid.* 134. & *Vide Patton's Lessee vs. Easton*, 1 *Wheat. Rep.* 480. *Tasker's Lessee vs. Whittington*, 1 *Har. & M'Hen. Rep.* 151. *Hatch vs. Hatch*, 2 *Hayw. Rep.* 34.

In the case of *Innis vs. Miller & Al.* (10 *Martin's Rep.* 292,) The Defendants set up a title by prescription, and to make out the requisite length of time attempted to connect their possession with that of their predecessor, but THE COURT said; "Three things "must concur, in order that they may unite the possession of "their predecessor to their own:—1. He must have possessed in "good faith and under colour of title. 2. It must be continued, "and without interruption. 3. It must be that which the possessor had at the moment of the tradition. The Defendants have "failed to bring themselves within either of those rules."

An individual put in possession by the Spanish Government, by metes and bounds, of a part of the King's land, as her own, acquired such title, which strengthened by long possession must prevail. *Sanchez & Wife vs. Gonzales*, 11 *Martin's Rep.* 207.

In the case of *Bloss vs. —*, decided October Term, 1802, (2 *Hayw. Rep.* 223,) JOHNSTON, J. said; "Seven years possession "without a colour of title, will bar the Plaintiff's right to an ejectment." But the reporter adds the following note: "*Quære*, as "to the seven years naked possession being a bar to the Plaintiff; "for it is not law as the Court of Conference has since decided." *Vide Stanley vs. Turner*, (decided June Term, 1804.) *Cam. & N. W. Rep.* 545. *Same Case*, (December, 1804,) 2 *Hayw. Rep.* 336.



In the case of *Somerville vs. Hamilton*, (4 *Wheat. Rep.* 233,) where a party had been in possession more than seven years under claim of title, STORY, J. delivering the Opinion of the Court, said ; " A possession for such a length of time, under title, was, by the Statute of Limitations of North Carolina, a conclusive bar against any suit by any adverse claimant, unless he was within some one of the exceptions or disabilities provided for by that Statute."

Under the Statute of Limitations of Tennessee of 1797, c. 43. s. 4. peaceable an uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant or deed of conveyance founded on a grant, gives a complete title to the person who has the possession. *Piles & Al. vs. Bauldin & Al.*, 11 *Wheat. Rep.* 325.

A *Dévisé* is colour of title, and seven years possession under it bars the right of entry. *Den ex dem. Evans vs. Satterfield*, 1 *Murph. Rep.* 413.

Although it is well settled in the State of New-York, and in most of the other States of the Union, that a possession, to be adverse to the true owner, must be *under colour and claim of title*; yet a contrary opinion seems to be held in some few of the States; and, in one instance, at least, the question was left undecided.

In the case of the *Lessee of Potts vs. Gilbert*, decided in the District Court of the United States for the District of Pennsylvania in the third Circuit, (1 *Hall's Journal of Jurisprudence*, 256,) WASHINGTON, JUDGE, in his charge to the Jury, said;

" Whether to support the possession of a person who enters without title upon a piece of land, who encloses, improves and cultivates it, and continues the same peaceably for the space of twenty-one years, it is incumbent upon him to shew that such possession was taken and continued under a claim or colour of title; is a question of great importance, and in my opinion, of no small difficulty. The affirmative of this question seems to be maintained by the learned Judges of New-York, and that opinion is therefore entitled to our highest respect. My own mind is not decided upon this point, and as it is not material to the decision of this case, I shall express no opinion upon it."

In *Anderson vs. Gilbert*, (1 *Bay's Rep.* 375; 376.) BAY, J. Held, " That whatever a party intended to rely on possession for title, it was unnecessary either to prove payment of a consideration, or of other colour of a title; because it was *occupancy alone* that the law regarded, as a sufficient title in such cases." & *Vide Strange vs. Durham*, 3 *Bay's Rep.* 429.

In *Gay vs. Moffit*, (2 *Bibb's Rep.* 206.) which was an action of ejectment, JUDGE LOGAN, who delivered the Opinion of the Court, said; "It will be admitted, that a mere naked possession for twenty years will in general bar this action. But a right thus derived must be founded on an adverse possession."

And in the case of *Den ex dem. Van Wickle vs. Alrough*, (2 *Penn. Rep.* 452.) PENNINGTON, J. said; "Whether Fairly went into possession under an equitable title, or under no title at all, is in my view of the subject immaterial, if he held as his own and denied the right of Johnson."

And this seems formerly to have been the doctrine in Connecticut; for in the case of *Trowbridge vs. Royce*, (1 *Root's Rep.* 50,) where it appeared upon the evidence, that "the plaintiff's ancestor more than fifteen years before the commencement of the suit, gave the defendant licence to build a shop upon this plot of ground, without any consideration, and to use and improve it without any limitation as to time, or reserving any rent, that the defendant accordingly built a shop on said ground, and had continued to use, improve, and enjoy it as his own without any claim or molestation from any person for more than fifteen years, &c. Verdict and judgment for the defendant." & *Vide Lane vs. Copley*, 1 *Ibid.* 68. *Smith vs. Isaacs*, 1 *Ibid.* 151. *Miller vs. Dow*, 1 *Ibid.* 412.

And in the case of *Overfield vs. Christie & Al.*, (7 *Serg. & R. Rep.* 177.) TILGHMAN, Ch. J. delivering the Opinion of the Court, said; "Our law permits all persons whether in or out of seisin or possession, to transfer their claims, such as it is, good or bad, by deed or will. And I have no manner of doubt, that one who enters as a trespasser, clears land, builds a house and lives in it, acquires something which he may transfer to another; and if the possession of the two added together, amounts to twenty-one years, and was adverse to him who had the legal title, the Act of Limitations will be a bar to his recovery."

Actual occupation of Land for 21 years, however tortious or destitute of colour of title, gives a right to the extent of the inclosure, against all the world, but the State. *Munshower & Al. vs. Patton*, 10 *Serg. & R. Rep.* 334.

But no act or deed which is void can be the foundation of an adverse possession; for it can give no colour of title.

A sheriff's deed, which is void for want of jurisdiction in the Court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the Statute of Limitations. *Den ex dem. Walker vs. Turner*, &

*Wheat. Rep.* 541. And in citing the case of *Harris and Holmes v. Bledsoe's Lessee*, decided by the *Supreme Court of Errors and Appeals* of the State of *Tennessee*, in January, 1821, the SUPREME COURT of the *United States*, coincide with the opinion given by the COURT of *Tennessee*, and say; "But the infirmity of the defendant's title lay in one of the links of the chain, which was that of a deed from executors who had no power to sell and convey by the law, nor was it given by the Will of the Testator. Even a deed of confirmation, which was executed with a view to cure this defect in the title, was unavailing, 'because,' to use the language of one of the Judges, 'the Act to be confirmed was void.'" *Ibid.* 551.—& *Vide Pray vs. Pierce*, 7 *Mass. Rep.* 383.

In the case of *The Lessee of Powell & Al. vs. Harman*, on a certificate of division of Opinion of the judges of the *Circuit Court* of the *United States*, for the District of *West Tennessee*, THE SUPREME COURT OF THE UNITED STATES, at their *January Session*, 1829, ordered it to be certified to the said *Circuit Court*, "That a void deed is not such a conveyance, as that a possession under it will be protected under the Statute of Limitations." (This case will be reported in the 2d Vol. of *Peters' Rep. Sup. Ct. U. S.*)

In the case of *Galatian & Al. vs. Cunningham*, (*On Appeal*, 8 *Cow. Rep.* 374.) WOODWORTH, J. said; "The question of confirmation applies only to the purchase by the trustee; that being a subject of confirmation. If the previous proceedings were fraudulent and void, it was incapable of confirmation. In *Cok. Lit.* 295, b., the doctrine is laid down, that a confirmation may make a voidable or defeasible estate good; but it cannot strengthen a void estate. (5 *Vin.* 389, (Y. pl. 5, S. P.)

In the case of *Bromley vs. Holland & Al.*, (*Cooper's Cas. in Ch.* 24.) ELDON, LD. CHANCELLOR, said; "I do not see how a deed which is null and void, is capable of confirmation."

A void lease is incapable of confirmation at law. *Sinclair vs. Jackson ex dem. Field*, (*In Error*), 8 *Cow. Rep.* 544, 538.

The purchaser of a real estate of a minor cannot avail himself of the prescription, *brevi temporis*, if all the legal formalities were not observed in the sale. *Francoise vs. De La Ronde*, 8 *Martin's Rep.* 619, 631; The COURT, speaking of the defendant's deed, said; "It purports to be a sale, made by a tutrix of the property of her ward, and as such is wholly informal and illegal, the requisites of the law cited not having been complied with. The vendee saw most clearly that he was purchasing from one person the property of another."

That deeds which are absolutely void cannot be the foundation of title, or that, a *Cestui quæ trust* can claim nothing under a deed which is fraudulently obtained by his trustee or agent acting under his authority, need not to be controverted. *Brooks vs. Marbury*, 11 *Wheat. Rep.* 90.

Possession under a void execution was obtained by the attornment of the defendant's tenant: *Held*, that the attornment was void; that the possession thereby obtained was not adverse to the defendant, or his assigns; and must be held as the tenant held it, (viz.) as the tenant of the defendant, or his assignee. *Hoskins vs. Helme*, 4 *Littell's Rep.* 310.

"There was another ground of defence mentioned and discussed upon the argument; and that was the existence of an adverse possession of 20 years, sufficient to toll the plaintiff's entry. From the time that *Miller* and the other tenants surrendered their possessions to *Taylor*, to the time of bringing the suit, above 20 years had elapsed, and if the Statute of Limitations had begun to run from the time of that surrender, the lessors of the plaintiff would undoubtedly have been barred. But it did not begin to run, for reasons which I shall presently mention. It has been urged that there was a suspension of the Statute by reason of coverture, rights in remainder, &c. This, however, is a mistake. There was no disability on the part of *Lady Stirling*, and she owned the whole estate in fee, under her husband's will, at the time of *Taylor's* entry."—"But the reason why the Statute of Limitations did not then begin to run against her, is this, that the surrender was not, *of itself*, and without reference to the title of *Taylor*, a disseisin or ouster sufficient to set the Statute in motion. There is no fact found by the special verdict amounting to an ouster, unless it be, what is termed in the case the attornment of the tenants in acknowledging to hold or accepting leases under *Taylor* instead of *Lady Stirling*. But unless *Taylor* was lawfully entitled to the possession, this attornment could not, in any way, prejudice the rights of *Lady Stirling*, and it was, of itself, null and void." *Jackson ex dem. Livingston & Al. vs. De Lancy and Russell*, (In Error,) 13 *Johns. Rep.* 552, 553. (Per *KENT*, Ch.) & Vide *Jackson ex dem. Van Beuren & Al. vs. Vosburgh*, 9 *Johns. Rep.* 270, 277.

Where A.'s tenant, from year to year, takes a lease from B., the act is void; and cannot work an adverse possession against A. *Jackson ex dem. Williams & Al. vs. Miller*, 6 *Cow. Rep.* 751.

In the case of *Jackson ex dem. Winthrop vs. Waters*, (12 *Johns. Rep.* 365.) The plaintiff produced the Letters patent to *Elkanah Dean* and others, issued by the colonial government of the province of *New York*, dated the 11th of *July*, 1769, and

made out a regular title, under that patent, to Lot No. 70. The possession of the defendant was admitted.

The defendant produced a writing dated the 28th of June, 1768, from *Francis Mackay*, who claimed under a grant from the *French Canadian Government*, to one *La Gauchetierre*, prior to the conquest of *Canada*, by which one *Jaques La Framboise* was permitted to take two lots of land in *Mackay's seignory*, on *Lake Champlain*, and settle himself there. *La Framboise* had entered in 1763, by permission from *Mackay*, but did not continue long; and again, in 1768 entered under the above writing from *Mackay*, and continued there until the *American war*, having cleared about twelve acres when he left the premises; and again returned in 1794, and remained in the possession until *January 25, 1803*, when he conveyed to *Charles L. Sailley*, in fee all his right in the said Lot No. 70 in *Dean's patent*. On the 17th of *March, 1803*, *Sailley* conveyed to the defendant in fee.

*Thompson, Ch. J.* delivered the *Opinion of the Court*, and after discussing the question of title, in conclusion, said; "The doctrine of this Court with respect to adverse possession, is, that it is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favour of possession in subordination to the title of the true owner. (9 *Johns. Rep.* 167.) It must be hostile in its inception, and continued so for twenty years; and must be marked by definite boundaries. (1 *Johns. Rep.* 156. 3 *Johns. Rep.* 230.) The possession held by *La Framboise*, prior to his conveyance to *Sailley*, in 1803, cannot be deemed adverse, if his original entry under *Mackay*, is not to be so considered, as it clearly is not, it being taken under a foreign government, which we must reject as a legitimate source of title. The plaintiff must, accordingly, have judgment."

"Deeds conveying the whole property of the person making them to a woman with whom he cohabited, without any proof of valuable consideration paid by her, she not having means to make such purchases, will be presumed to be void, as against creditors. The Statute of Limitations does not run in such cases." *Buist & Rowand vs. Smyth, Adm'r. &c.*, 2 *Eq. Rep.* (*Dessaussure's*) 214.

Where a conveyance of Land was obtained by fraud and imposition, and the same was acknowledged and recorded, and possession taken by the grantee, it did not operate such a disseisin as disabled the grantor afterwards to devise the estate. *Smithwick & Al. vs. Jordan*, 15 *Mass. Rep.* 113.

A grantee under a fraudulent conveyance cannot acquire a title

by possession against the creditors of the grantor. *Beach vs. Catlin*, 4 *Day's Rep.* 284.

A title void in itself, will prevent him in whose favour it was executed, from pleading prescription. *Dufour vs. Camfranc*, 11 *Martin's Rep.* 715. *Frique vs. Hopkins & Al.* 4 *Martin's Rep.* N. S. 224. *Bonne & Al. vs. Powers*, 3 *Ibid.* N. S. 462.

The prescription of four years against minors, runs only against them for those acts where the forms of law have been pursued in the alienation of their property. *M. & F. Gayoso De Lemos vs. Garcia*, 1 *Martin's Rep.* N. S. 324.

In the case of *Rabineau vs. Cormier*, (1 *Martin's Rep.* N. S. 461,) THE COURT said, "Under the circumstances of Error on the part of the Vendor in delivering property not sold, and Error on the part of the Vendee, in taking possession of that which he did not purchase, the question is, can the latter hold it by prescription? We think not. An important and indispensable requisite is wanting, to make out a title of the kind; the intention to possess. The Vendee intended to enter into, and hold the property sold him. What he possessed over and above the quantity purchased, was in error."

"If the title under which the acquisition is made, be null in itself, from defect of form, or discloses facts which show the person from whom it is acquired has no title, it cannot form the basis of this prescription; [*Prescriptio longi temporis*,] because the party acquiring must be presumed to know the law, and consequently wants the *animo domini*, which is indispensable in cases of this kind. But where the title is free from these defects, and the property is not transferred, by want of title in the party making the transfer, then it forms a good ground for the prescription; or in other words, the enquiry is, whether the error be one of fact, or of law." *L. & F. Frique vs. Hopkins & Al.* 4 *Martin's Rep.* N. S. 224.

But where possession is taken and held under an instrument which is *not void*, but only *voidable*, the prescription will run. So the Testator's concubine may prescribe under his will, against his brothers and sisters. And the action of *inofficiosi testamenti*, by which they might avoid such will, is barred by the lapse of five years. *Carrel's Heirs vs. Cabaret*, 7 *Mart. Rep.* 375, 408.

Devise to trustees in fee, in trust to permit A. H. to receive the rents and profits for life; remainder to W. H. in tail; remainder to J. S. in fee: Held, that a fine with proclamations, levied by W. H. to a stranger in the life time of A. H. was void; and therefore

the heir of J. S. was not barred by non-claim and want of entry. *Doe ex dem. James & Uz. vs. Harris*, 5 M. & S. Rep. 326.

A Sheriff's deed, which recites the execution under which the lands in dispute were sold, as having been tested and signed by the Deputy Clerk, shall enure as colour of title. For although the Constitution declares, "that all writs shall bear teste and be signed by the Clerks of the respective Courts, yet a Writ of Execution is not necessarily void because it bears teste and is signed by a Deputy Clerk; because the Act of 1777, Ch. 2 Sec. 95, provides that in the event of the death of the principal Clerk, the Deputy shall sue out writs and other process. *Den ex dem. Jones vs. Putney*, 3 Murph. Rep. 562.

A grant of Administration which was originally void, and not merely voidable, can acquire no validity from an acquiescence of twenty years, or any longer period. And the tenants who held under a conveyance from the administrator, executed upon a sale made twenty-six years before the trial, in pursuance of a license from the Court, to sell the whole real estate of the Intestates to pay their debts, could not set up such conveyance and their possession under it in bar of the demandant's action. WILDE, J. in delivering the Opinion of the Court, said; "Nor can lapse of time render an act valid, which was originally void. *Quod ab initio non valet, tractu temporis non convalescit.*" It was also Held, That the Statute of Massachusetts, of 1817, Ch. 190, § 12, by which actions to recover real estate sold by administrators, &c. on license, are limited to five years, applies only to sales made subsequently to the passing of the Statute. Such a sale made previously to the passing of the Statute, may be avoided after the lapse of twenty years. *Holyoke vs. Haskins & Uz.* 5 Picker. Rep. 20, 27.

In the case of *La Frambois vs. Jackson ex dem. Smith & Al.* (In Error.—8 Cow. Rep. 589, 605.) COLDEN, Senator, said; "I admit, also, that if an adverse possession be claimed under a grant or conveyance which never could have been the foundation of a good title, it cannot bar the recovery of one who shews "a perfect title."

Instruments which do not purport to convey title, as Leases, Contracts, &c. cannot be the foundation of an adverse possession.

"A mere contract for a Deed, though the purchaser enter under it, does not place him in a situation to hold adversely, till he perform the condition of the purchase by paying the purchase money; such a possession not being hostile in its inception." *Jackson ex dem. Young & Devereux vs. Camp*, 1 Cow. Rep. 610. *Botts & Al.*

*vs. Shields' Heirs*, 3 *Dittell's Rep.* 34. & *Vide Voorhies vs. White's Heirs*, 1 *Marsh Rep. (Ky.)* 27.

A possession and claim of land, under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance; nor is it such an adverse possession as, if continued for 20 years, will bar an entry, within the Statute of Limitations; and especially, it is in no sense adverse as to the one with whom the contract is made. *Jackson ex dem. Swartwout & Wife vs. Johnson*, 5 *Cow. Rep.* 74. *And to the same purport, Vide Proprietors of No. Six vs. M'Farland*, 12 *Mass. Rep.* 325. *Higginbotham & Al. vs. Fishback*, 1 *Marsh. Rep. (Ky.)* 506. *Wilkinson, &c. vs. Nichols*, 1 *Monroe's Rep.* 36. *Richardson & Al. vs. Broughton*, 2 *Nott. & McCord's Rep.* 417. *Fewke vs. Darnall*, 5 *Litt. Rep.* 316. *Chiles vs. Bridge's Heirs*, *Litt. Select. Cas.* 423. *Kirk & Al. vs. Smith ex dem. Penn.* 9 *Wheat. Rep.* 238. & *Vide Jackson ex dem. Marvin & Al. vs. Hotchkiss*, 6 *Cowen's Rep.* 401.

To constitute an adverse possession, it must not only be hostile in its inception, but the possessor must claim the entire title; for if it be subservient to, and admit the existence of a higher title, it is not adverse to that title. 5 *Cow. Rep.* 92. *Botts & Al. vs. Shield's Heirs*, 3 *Litt. Rep.* 34. *Proprietors of Township No. Six vs. M'Farland*, 12 *Mass. Rep.* 327. & *Vide Knox & Al. vs. Hook*, 12 *Mass. Rep.* 331.

Possession of land by consent of the true owner, is not adverse possession. *Atherton vs. Johnson*, *New Hamp. Rep. (R. & W.)* 31.

A person entering under a lease and holding over after his term has expired, will be regarded as holding by consent of the original landlord, and his possession is not adverse; and if he transfer the possession, his grantee is supposed to hold under the same title. *Brandter ex dem. Fitch vs. Marshall*, 1 *Caines' Rep.* 401. & *Vide Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 *Cow. Rep.* 123.

Title by improvement, is merely a right of pre-emption, until the purchase is made from the commonwealth. Up to that time possession is not adverse to, but under the commonwealth; and therefore, though it continue twenty-one years, it is no bar by the Statute of Limitations to the commonwealth, or her grantee. *Morris vs. Thomas*, (*In Error*), 5 *Binney's Rep.* 77.

But where a man claiming under an executory contract for the purchase of land, is evicted and turned out of possession by a Writ of *Habere facias possessionem*, on an adversary claim, he may purchase in such adversary claim, and assert it in defence, against



a suit brought by the heirs of the man from whom he first purchased. *Chiles vs. Bridge's Heirs, Litt. Select. Cas. 420.*

A tenant, who endeavours to deprive his landlord of the benefit of possession, under a fraudulent pretence of giving it up, is still to be considered as a tenant, and cannot defend himself against his landlord in an Ejectment, brought to recover possession. A person who comes into possession under a tenant is in no better condition than the tenant himself, and cannot defend his possession against the landlord. *Graham & Al. vs. Moore & Al. 4 Serg. & R. Rep. 467. & Vide Chiles vs. Bridge's Heirs, Litt. Select. Cas. 423.*

Where the relation of landlord and tenant exists, a conveyance by the latter of the demised premises, cannot operate as the basis of an adverse possession, so as to bar the former of his ejectment; whether the grantee knew of the devise or not.—But this rule means the conventional relation of landlord and tenant, where some rent or return is in fact received to the former; not a relation arising from mere operation of law; as where one makes a grant, and by the omission of the technical word *heirs*, an estate for life, only, passes.

In such case, after the death of the tenant for life, an adverse possession may commence running, in favour of those who enter and claim in fee under him, which after 25 years will bar all claim of the reversioner and his heirs. *Jackson ex dem. Webber & Al. vs. Harsen & Al., 7 Cow. Rep. 323.*

And where A. entered into possession of land under a lease in fee, reserving a pepper corn rent, in 1775, and in 1778, gave the land to B., by parol, who continued in possession, claiming under the lease, until 1798, excepting the period of the war, and a year or two after, and B. conveyed the premises to C., and C. to D., who conveyed the same to the defendant; it was held that this was a sufficient adverse possession to bar an action of ejectment by the person having title to the land, commenced in 1807. *Jackson ex dem. Colden & Al. vs. Moore, 13 Johns. Rep. 513.*

A. being the owner of certain lands in the *Lunenburg* patent, died, after having devised the same to his wife during her widowhood, remainder to B. and his other three brothers; a dispute having arisen between C. the daughter of B., and her husband, on one side, and the other devisees, on the other side, as to the portion of land to which she was entitled, her portion was ascertained and conveyed in 1772, to C.'s husband; and certain persons were appointed by the deed to locate and reduce to severally her share on any of the lands within the patent in the possession of the parties of the first part, (*the other devisees and the widow of B.*) or their tenants; the defendant entered upon the premises in question 23 years before the trial, claiming title under the husband of

C. ; and in an action of ejectment by persons claiming under A., it was *Held*, that there was such an adverse possession in the defendant as barred the action, and that it could not be repelled by shewing that he had obtained his possession from the tenants of the lessors of the plaintiffs, or their ancestors, as it was to be presumed, after such a lapse of time, that the persons appointed to locate the share of C. had located it upon lands in the possession of the tenants, as they were authorized to do. *Jackson ex dem. Livingston & Al. vs. Hallenbeck*, 13 Johns. Rep. 499.

In the opinion delivered by JONES, late Chancellor, in the case of *La Frombois vs. Jackson ex dem. Smith & Al.*, (*In Error*.—8 Cow. Rep. 589, 597.) he *Held*, that a claim under an executory contract to convey lands, the consideration being paid, and such contract therefore being capable of being specifically enforced, in equity against the vendor, might be a sufficient claim under colour of title to constitute an adverse possession within the Statute of Limitations: he said; "The writing produced, admitting it to be simply a contract for a conveyance, is in accordance with the possession he [*the defendant*] held, and the claim of title under it." "It was an express agreement by a person claiming to have the right to contract for the disposal of the land, to convey to him the lot he should locate, when conveyances were to be given, and an agreement that he should enter into immediate possession, and hold the premises thus contracted to be conveyed to him, without rent, until the conveyance should be given."

"Under such an agreement, reduced to writing, and followed up by possession and improvements, the defendant acquired a title in equity to the land, if *Mackay*, the party contracting to convey, had at the time, or afterwards, acquired the right or power to perform his agreement. It was a contract which equity would have enforced the performance of, and the right of *La Frombois* under it was the more perfect and stable, as the consideration had obviously been already paid or satisfied by him to *Mackay*, and there was nothing further to be done by him to entitle him to a conveyance of the legal title."—And he adds, (*Page 602.*)

"Whatever the right of *Mackay* was, if *La Frombois* went into possession, supposing it to emanate from a legitimate source, and in confidence that his contract entitled him to a conveyance, and that *Mackay* had the right to give the conveyance he promised, his possession would be adverse, notwithstanding his confidence was misplaced, and the title of *Mackay*, under whom he entered, was invalid. Whether a grant of the land under the authority of the French government, prior to the conquest of Canada by the British, would vest any title in the grantee, or confer on him the right under the treaty of *Paris* to a patent from the English government, either absolutely or upon terms, are questions which I consider it unnecessary and improper now

"to discuss. I assume that whatever right Mackay supposed himself to have to the land, no evidence appearing to the contrary, he founded upon some title or claim to a title under the colonial government; and his assuming to be entitled, and contracting to convey, gave to the purchaser under him a color of title, which would characterize the possession of such purchaser under such contract, as adverse against all other claimants."

But this, was the only opinion expressed, as to the effect of a claim of equitable title as a foundation of an adverse possession. It is the legal, and only the legal title or claim, which is brought in question in an action of Ejectment; a mere equitable title or claim, will avail neither the Plaintiff nor Defendant. (*Adams on Ejectment*, 32. *Jackson ex dem. Potter vs. Sisson*, 2 Johns. Cas. 321. *Jackson ex dem. Smith & Al. vs. Pierce*, 2 Johns. Rep. 221. *Jackson ex dem. Simmons & Al. vs. Chase*, *Ibid.* 84. 86. *Jackson ex dem. Whitbeck & Al. vs. Deyo*, 3 Johns. Rep. 422, 423. *Jackson ex dem. Kemball vs. Van Slyck*, 8 Johns. Rep. 380.) The colour and claim of title, in cases of adverse possession, however defective it may be, must still, according to all the cases hitherto adjudged, be a colour and claim of legal title; and not a claim of a mere equity. *Vide Ante*, Pages 390, 391.

But defective conveyances, which are not absolutely void, may in certain cases be the foundation of an adverse possession; as where the occupant or those under whom he claims were *bona fide* purchasers; and especially if such defective conveyance were received from the Lessor of the plaintiff, or any person from, through, or under whom the Lessor claims the beneficial title.

In the case of *Jackson ex dem. Vanderlyn & Betts vs. Newton & Al.* (18 Johns. Rep. 355.) the lot of which the premises in question were part, was patented to Timothy Church, in July, 1786. In the year 1797, Joshua Newton, went into possession of the premises under a contract for the land with Eleazar Church, son of Timothy Church; on the 19th February, 1798, Joshua Newton received from Timothy Church, a deed for the premises, which had no actual Seal, but a flourish at the end of the grantor's name, with the letters L. S. made with a pen. When the deed was executed it was said there was no wax or wafers, and that a flourish with a pen was equally good; Joshua Newton paid a part of the consideration money down, and gave a mortgage for the residue, which he afterwards paid and took up. The defendants were *bona fide* purchasers under him, and he and they had held the uninterrupted possession, until the commencement of the ejectment suit in May term, 1818.

In the year 1800, James and William Anderson recovered a judgment against Timothy Church, and issued an execution, by virtue of which the lot containing the premises in question was sold to the said James and William Anderson, who received a

Sheriff's deed therefor, bearing date June 4, 1801. On the 19th July, 1808, John Taylor recovered a judgment against *William Anderson*, which was revived, by *Scire Facias*, against his heirs and terre-tenants, and the record thereof docketed 8 August, 1817; upon which a *Fi. Fa.* issued, by virtue whereof the said lot was sold to the lessors of the plaintiff, who received a deed therefor from the Sheriff of the county of Chenango, dated October 11, 1817.

It was *Held*, that the defendants' possession was adverse to the lessors of the plaintiff, and sufficient to defeat the suit.

In the case of *Strange vs. Durham*, (2 Bay's Rep. 429.) it appeared that the land in dispute was granted to the plaintiff's father more than 20 years before; that the father was dead, and that the plaintiff was his heir at law. The defendant offered in evidence a conveyance made by the plaintiff's attorney, one *Andrew Kidd*, under which deed he claimed, but as the power was a joint one to the attorneys, four in number, and only one of them had made the deed, an exception was taken to it on the trial, as nugatory in itself, which was sustained by the presiding Judge, *Trezevant*. The defendant subsequently relinquished all claim under his deed from *Kidd*, the attorney of the plaintiff, and rested solely on his possessory right under the Statute of Limitations. Against this right of possession it was alleged, that as the defendant went into possession of the land by virtue of this purchase and deed from *Kidd*, which he knew to be defective, he could not afterwards relinquish his claim to it, and set up title by possession only; though it was admitted he might have done so, if he had not accepted this conveyance. And of this opinion was the presiding Judge in his charge to the jury, but they found a verdict for the defendant. Upon a motion for a new trial, on the ground of the verdict's being against law, and the charge of the Judge who tried the cause; all the other Judges concurred in opinion, however, that there should not be a new trial, as it could not vary the plaintiff's right of action whether the defendant knew that his title was good or bad. It did not depend on the defendant's knowledge or ignorance of the plaintiff's title, but on the Statute, which had expressly taken away the plaintiff's remedy, unless his action had been commenced within five years from the time of defendant's entry upon the land.

In the case of *M'Koy vs. The Trustees of Dickinson College*, (5 Serg. & R. Rep. 254.) it was *Held*, that a commissioner's deed under their common seal was no evidence of title: but that it was evidence for the purpose of showing that one who was proved to have been in possession, held adversely to the plaintiff in a case where the defendant relies on the Statute of Limitations as a defence.

' Adverse possession of a *negro*, for more than three years, is a good defence, under the plea of the Statute of Limitations. *Bell vs. Breemen & Al.*, 3 *Murph. Rep.* 273.

In the case of *Jackson ex dem. Roosevelt & Al. vs. Wheat*, (18 *Johns. Rep.* 40.) The plaintiff claimed title under the *Minisink* patent. The defendant set up in his defence, a title by possession, and also that the lot occupied by him was not within the bounds of the *Minisink* patent.

*John Gillet*, a witness, testified, that the defendant had lived on the premises about forty years; that *William Gillet*, uncle to the witness, was the first occupant of the next lot east in *Deerpark*. That the defendant bought of *William Gillet*; but witness did not know whether defendant had a deed; that *William Gillet* had a deed, and the witness supposed the defendant had one. *William Gillet* claimed title under the *Minisink* patent, and purchased of *Henry Wisner*, one of the proprietors.

The plaintiff called on the defendant to produce the deeds mentioned by the witness, which he refused to do, and they were not produced.

The defendant then offered to prove that the premises were not contained within the bounds of the *Minisink* patent, which evidence being objected to, was over-ruled by the judge.

"*Per Curiam*. 1. The possession of the defendant was, undoubtedly, adverse: it has been continued for a period of between 40 and 50 years, under a claim of title, by purchase from *Gillet* who had a deed. It was not necessary to produce that deed though called for by the plaintiff. Suppose the deed had been lost, or when produced was found to be defective, that could not have destroyed the effect of the defendant's possession. In *Smith vs. Lorillard*, (10 *Johns. Rep.* 356.) *Kent*, Ch. J. said, "that after a continued possession for twenty years, under pretence or claim of right, the actual possession ripens into a right of possession which will toll an entry;" and in *Smith vs. Burtin*, (9 *Johns. Rep.* 180.) *SPENCER*, J. said, (*Van Ness, J. and Yates, J.* concurring) that "it had never been considered necessary to constitute an adverse possession, that there should be a *rightful* title. Whenever this defence is set up the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests:" and in *Jackson v. Ellis*, (13 *Johns. Rep.* 120.) the Court said, that it had been repeatedly ruled in this court, that an entry under claim or colour of title is sufficient to constitute an adverse holding. It is not necessary, for this purpose, that the title under which the entry is made, should be a good and valid title. (2 *Caines*, 183.)"

Though the possessor claim under written evidence of title, and on producing that evidence, it proves to be defective, yet the

character of his possession, as adverse, is not thereby affected. If the entry is under colour of title, it is sufficient; the possession will be adverse. The fact of possession, and its character, or the *quo animo*, are the test. *La Frombois vs. Jackson ex dem. Smith & Al.* (In Error,) 8 Cow. Rep. 589.

In the case of *Hampton's Lessee vs. McGinnis*, (1 Tenn. Rep. 286.) it was Held that where the defendant had been in possession for seven years under colour and claim of title, it was not necessary to shew a regular chain of conveyance to himself from the first purchaser, under whom he claimed title, and who held under a county warrant, but had conveyed the premises, by deed, before he had obtained that warrant, to one from whom the defendant deduced a regular chain of title. & Vide *Craddock's Lessee vs. Stalcup*; 1 Tenn. Rep. 351.\* *Sawyer's Lessee vs. Shannon & Al.* Ibid. 465.

"If a person takes a grant or conveyance from one having, himself, a bad or defective title, the title is also *prima facie*, bad or defective, in the hands of the grantee. If it be not so on account of his being an innocent and *bona fide* purchaser without notice, it is for him, or those claiming under him, to maintain that he was such purchaser without notice; and if he, or those claiming under him, do not do so, witnesses shall not be permitted to do it for them." *Galatian & Al. vs. Cunningham*, (On Appeal,) 8 Cow. Rep. 382. (Per COLDEN, Senator.)

Conveyances good in point of form, and professing to convey the entire title, although executed by a grantor, who has not a good title, or even no title at all, are notwithstanding a sufficient foundation for an adverse possession, where the grantee is a purchaser for a valuable consideration; and has no notice, either actual or constructive, from the face of his deed, from the deeds through which he deduces his title, or from any other source, of the existence of a better title.

Letters patent, bearing date the 13th September, 1790, for lot No. 7. in Ovil, were granted to *Jacob Van Gelder*, a deceased soldier, who died the 18th January, 1779, leaving nine children, *Jacob, Reuben, William, Elijah, Mary, Abigail, Elizabeth, Mercy*, and *Sally*. *Reuben Van Gelder*, one of the children of the patentee, on the 13th of October, 1791, executed to *Stephen Thorne*, a deed for the entire premises, styling himself administrator and heir of *Jacob Van Gelder*. On the 14th February, 1794, *Stephen Thorne*, executed a deed for the same premises to *Peter Smith*; and on the 8th December, 1807, *Peter Smith*, executed a deed for the premises to the Defendant.

On the 7th January, 1792, *Jacob, William, and Elijah*, three of the children of the patentee, executed a quit-claim deed to

*Reuben Van Gelder*, for the premises. On the 22d January, 1812, *Sarah, Mercy, Mary, & Abigail Van Gelder*, and *Elizabeth Wichill*, the five other children of the patentee, executed a quit-claim deed of the premises to *Reuben Van Gelder*; and on the 19th August, 1813, *Solomon Van Gelder*, the husband of *Mercy*; *Elijah Van Gelder*, and *Joseph Van Gelder*, the husband of *Mary*, executed a deed of the premises to *Reuben Van Gelder*.

*Elijah Van Gelder*; *David Van Gelder*, & *Abigail* his wife; *Solomon Van Gelder* & *Mercy*, his wife; *Elizabeth Philo*; *Sally Van Gelder*, and *Joseph Van Gelder*, & *Mary* his wife, executed to *William Preston*, a deed of the premises bearing date the 13th February, 1798.

*Jacob, William & Elijah Van Gelder*, executed a deed of the premises bearing date the 15th March, 1798, to *William Preston*. On the 4th October, 1798 *William Preston*, executed a deed of the same to *David Matthews*, who by his will dated 29th August, 1810, devised an undivided moiety, to *John Matthews* his only son, and the residue to his said son, and *Robert Morris* and *Garrit Wendell*, in trust, for certain purposes stated in the will.

When *Preston* first attempted to purchase the lot from the heirs of the deceased soldier, he was told that *Reuben* had sold the lot to *Thorne*. The witness saw *Thorne* pay money to *Reuben*, and all the other heirs received a share of the money; but the witness did not know whether they were present at the sale to *Thorne*.

The Court held that there was an *adverse possession* which protected the defendant, and said; "The conduct of *Reuben*, subsequently to the conveyance made by him, confirms in a great degree, what has been stated to have been the intentions of all the parties when it was executed. The consideration received was divided between all the children. They, therefore, supposed the sale made by *Reuben* sufficient to pass the entire lot, or they never would have accepted of their proportion of the consideration received for it; and *Thorne*, supposing himself to have obtained a good title, did not hesitate to dispose of it to a person who entered as owner of the whole lot.

"If, therefore, it is conceded that *Reuben's* deed conveyed one ninth part only to *Thorne*, and that if he had entered under it such entry would have been according to his right as tenant in common, and that his co-tenants could not have been disseised, because the possession would not have been adverse to their rights; still this cannot change the character of the defendant's possession, nor the previous possession of his father. Neither of them had any knowledge of this deed. The father purchased by warranty deed from *Thorne*, who represented himself to be the sole proprietor of the lot. As early as July or August, 1792, while the defendant's father was on the lot, *Thorne* went to view it,

“and avowed himself to be the owner, and sold it for 140*l*. From that period, in strictness, the adverse possession commenced. At all events, it commenced from the date of *Thorne's* deed to the elder *Smith*, which was in *February*, 1794. It is evident, therefore, that the doctrine, in relation to the possession of tenants in common, does not apply to this case. It might as well be urged as applicable to a conveyance made by a stranger, of any lands held in common. And it will not be questioned, that the possession of a purchaser under such a deed, given without right on the part of the grantor, would notwithstanding, be adverse to the rightful owners, although held by them in common. But, in the present case, no such tenancy did in fact, exist.” It was also held that the adverse possession of *Smith*, the grantee of *Thorne*, was sufficient to defeat the conveyances obtained by *William Preston*, in 1798. And that the conveyances executed by all the children of the patentee to *Reuben*, must enure to the benefit of the defendant, who held under *Reuben*, through *Thorne*. *Jackson ex dem. Preston & Al. vs. Smith*, 13 *Johns. Rep.* 406, 412, 413.

Five years actual adverse possession of a tract of land under a junior grant, will give the tenant a title to so much as he has in actual possession, even against a person who has a paramount title, and is in the constructive possession of the part in dispute. *Middleton vs. Dupuis*, 2 *Nott & McCord's Rep.* 310.

In *Jackson ex dem. Hill vs. Streeter*, (5 *Conn. Rep.* 530, 531.) *BUTTERLAND, J. delivering the Opinion of the Court*, said; “I do not understand the Judge as having excluded the patent to *Miles*; but only as deciding that the patent itself without other evidence, would not shew a subsisting title out of the Lessor of the Plaintiff. In this, I apprehend, he was correct. The Plaintiff had shown a deed for the premises in question from *Buck* to *John Streeter*, in *September*, 1798; that *Streeter* went into possession under the deed, and continued in possession until his death, 19 or 20 years before the trial, leaving four children; (the interest of two of them being owned by the Lessor;) and that the Defendant *Benjamin*, one of the children, has been in possession ever since. This was a good adverse possession against the patent granted in 1790.

“The evidence that *Buck*, who gave the deed to *John Streeter*, had no title, was properly rejected on several grounds. *John Streeter* was the common source of title to both parties. His children, there being no will, are presumed to have taken the premises by descent, as tenants in common. It is not for the Defendant to say that the common ancestor had no title, and that his possession is not as tenant in common, but in his own individual right.”



So in the case of *Jackson ex dem. Belden & Al. vs. Thomas*, (16 Johns. Rep. 293.) where the Plaintiff claimed the premises in question as part of the *Minisink* patent, the question of title depended on the adjustment of the boundary lines of that, and of four contiguous patents, viz: *John Evans' Patent*, *Bridge's Patent*, *Holcomb's Patent*, and *White's Patent*. On the trial the Defendant proved that part of the premises was within *White's* patent, and all the land covered by this patent was relinquished on the trial by the Plaintiff. The Defendant also proved that of the residue of the premises he had been in possession for more than twenty years, as a purchaser from *Holcomb*; and that *Holcomb*, after obtaining his patent, and several years before the Defendant's purchase from him, had taken possession of the same, claiming it as included within the bounds of his said patent. It was decided, however, by the Court, that this part of the premises lay within the lines of the *Minisink* patent, and therefore belonged to the lessors of the Plaintiff. But the Defendant had judgment on the ground of his adverse possession; and SPENCER, Ch. J. who delivered the *Opinion of the Court*, said; "It appears to me, that an adverse possession is abundantly made out. When the patent was granted to *Holcomb*, he did not live on the premises in question; but ever since the granting of the patent, that part of the premises not included in *White's* patent, have been held by *Holcomb*, and those who have purchased of him; and the fact is proved, that the Defendant is in possession claiming title under *Holcomb's* patent, and he certainly entered into possession since the granting of the patent to *Holcomb*, for his possession has been for twenty, or twenty-five years." "If the Defendant was not in possession when *Holcomb's* patent issued, and the case shows he was not, and if these premises have been held ever since that patent issued, by *Holcomb*, and those claiming under him, then the Defendant's possession was, in its inception, adverse.

"The principle, however, that possession, must in its inception be adverse, and continue so, is not well understood. In those cases in which that observation occurs, nothing had happened to change the character of the first possession, and that was considered as denoting *quo animo* the possession was held after the first entry.

"If one enter on land without any title or claim, or colour of title, the law adjudges the possession to be in subservience to the legal owner, and no length of possession will render the holding adverse to the title of the owner; but if a man enters on land, without claim or colour of title, and no privity exists between him and the real owner, and such person, afterwards, acquires what he considers a good title, from that moment his possession becomes adverse. I am not sensible that the Court have ever held a contrary doctrine.

"In the present case, even *Holcomb* was not in possession of these premises when his patent issued, though he entered imme-

"diately after. It appears to me that an adverse possession for a sufficient length of time to bar the Plaintiff's right of entry, is clearly established by the evidence."

It will be seen from the facts of this case, that a great part of the above opinion is merely hypothetical, and had no immediate relation to the question before the Court; as the Court unhesitatingly decided that the possession set up by the Defendant, "*was, in its inception, adverse,*" the discussion of the question, whether a possession, in its origin, "in subservience to the legal owner," could by any and what subsequent event, be converted into an *adverse* possession, seems to have been uncalled for in the decision of the cause; and consequently, the opinion expressed on that point would appear to have only the authority of a *dictum*. But it has since been incidentally recognized as authority; and the extent and meaning of those observations of Chief Justice SPENCER, have been limited and defined. It is also to be remarked, that the qualifying words, "*and no privity exists between him and the real owner,*" materially restrain that generality of expression which would otherwise conflict with the settled course of decisions in that Court; it is not to be imagined, that such was the intention of the Chief Justice.

In the following case of *Jackson ex dem. Ten Eyck & others vs. Frost*, (5 Cow. Rep. 346.) the Supreme Court have explained the meaning of the expressions used by the chief justice in the above case.

One ground of defence insisted upon at the trial, was that of an adverse possession; in support of which, the defendant "proved, that one *M'Alpin* occupied the premises in question in 1795, "claiming them as his own, saying they were in a gore; which "therefore belonged to the settlers; that *M'Alpin* was in possession 25 years before the trial, and more than 20 years before the "suit was commenced; that about 25 years before the trial, he "exchanged farms with one *Miller*, now deceased."

The defendant offered to show by *Miller's* declarations, that he had a deed from *M'Alpin*; which evidence was objected to, and excluded by the judge.

The defendant then proved that *Miller* remained in possession 12 or 15 years, whence the possession passed through several hands down to the defendant.

The widow of *Miller* swore that when her husband exchanged with *M'Alpin*, he took a quit-claim deed from *M'Alpin*, who said he thought he had a good title; that no rent had been claimed or called for; and the premises in question were not included in any of the patents; that this was 27 years before the trial; that she could not read; did not see any deed executed; but *M'Alpin* agreed to give one; and her husband had a paper which he said was a deed from *M'Alpin*.

The judge charged that the plaintiff had made out a sufficient title and location, and that the defendant had failed in establishing a bar by adverse possession.

The opinion of the court was delivered by SAVAGE, Ch. J., who, in reference to the defence of adverse possession, said ;

"The defendant, and those under whom he claims, have had possession for a sufficient length of time. The only difficulty is, as to the character of that possession. Was it adverse? *M'Alpin* was the first possessor; he claimed it as his own. Why? It was a gore; no rent had been demanded; and it of course belonged to the settlers. This amounts to saying that he claimed it, because he had no title; for if it was a gore, then the land belonged to the state. The idea that rent could be demanded, presupposes a landlord, and of course an owner. The deed to *Miller* was given with this parol abstract of the title; it was not that he owned the land, because the fee was vested in him by purchase or descent; but it was his because there was no other owner. This is no title on which to rest an adverse possession. The purchaser, who took such a deed, knew that what he purchased amounted to nothing; for he was bound to know it.

"I am aware that it was said in the case of *Jackson vs. Thomas*, (16 John. 301.) that "if a man enters on land, without claim or colour of title, and no privity exists between him and the real owner, and such person afterwards acquires what he considers a good title, from that moment his possession becomes adverse." This doctrine must not be understood as authorizing the purchaser to consider a naked possession a good title. It must be, as I understand the law, such a title as the law will, *prima facie*, consider a good title. Otherwise there would be no uniformity. The character of the possession might be made to depend upon the understanding of the tenant; and the same possession which would be a good defence to one, would be worthless to another. And hence a possession under a French grant was held not to be adverse, because such a grant could not possibly be the source of a good title.

"The possession of *Miller*, therefore, seems to me to be merely a continuation of *M'Alpin's* possession, with no greater rights, but precisely of the same character. Admitting therefore, that the possession of *Miller's* grantee was adverse, the length of time is not sufficient to bar the plaintiff."

The defendant, and those under whom he claimed, had been in actual possession of the Lands in controversy, for more than twenty-five years, under a colour and claim of title, by deed; *Held*, that the lessors of the plaintiffs were barred; all their disabilities having ceased more than seven years before the commencement

of the suit. *Doe ex dem. Pritchard & Al., vs. Sawyer*, 1 Hawk's Rep. 337.

"The rule *caveat emptor*, applies only to purchasers of defective legal titles. A purchaser of the legal title is not to be affected by any latent equity, whether founded on trust, fraud or otherwise, of which he has not actual notice, or which does not appear in some deed necessary in the deduction of the title, so as to amount to constructive notice." *Willcox vs. Calloway*, 1 Wash. Rep. 41. & *Vide Hove & Harrison vs. Pierce, Adm'r. Ibid.*, 217.

In the case of *Dexter vs. Harris*, (2 Mason's Rep. 536.) STORRY, J. delivering the Opinion of the Court, said; "The doctrine upon this subject as to purchasers is this, that they are affected with constructive notice of all, that is apparent upon the face of the title deeds, under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other facts extrinsic of the title, and collateral to it, no constructive notice can be presumed; but it must be proved."

The Statute of Limitations will not run in favour of a purchaser for valuable consideration, who had knowledge of the rights of the parties, nor where he held as tenant in common, and during the minority of the other party. *Saxon & Uz. vs. Barksdale & Al.*, 4 Eq. Rep. (Dess.) 522.

A defendant in ejectment being in possession of the land for which the suit is brought, holding the same by a title adverse to that of the plaintiff for twenty years or more, is not necessarily entitled to a verdict. *Bowie vs. O'Neale & Al. Lessee*, (On Appeal,) 5 Harr. & Johns. Rep. 226. In this case the defendant held as devisee under the will of a husband, the lands in question, which were the property of the deviser's wife; it was Held, that such possession could not create a presumption of title, or prevent the recovery of those deriving title under the wife.

Only an innocent purchaser, obtaining the title without notice, will be protected in equity. A volunteer cannot occupy more favourable grounds than his principal. *Rearden vs. Searcy's heirs & Al.* 3 Marsh. Rep. (Ky.) 542, 543.

In the case of *Jackson ex dem. Sitzler vs. Waltermire*, (7 Cow. Rep. 353, 357.) the plaintiff brought ejectment for dower set off to his Lessor as the widow of Frederick Sitzler, in the farm possessed by the defendant. The plaintiff proved that the Lessor's husband resided on the farm in question, and used it as his own

during the coverture, that he died the last day of *April*, 1821. The defendant gave in evidence a deed from *Frederick Sitzer* in his lifetime, dated *November* 16th, 1785, by which *Sitzer* granted, &c. and quit claimed to *A. Wilcox*, his heirs and assigns, all his (*S.'s*) right, title, &c. of, in and to the possession and improvements of the farm in question. *Sitzer* covenanted in this deed, that he was then truly and lawfully possessed of the premises, as the same were truly granted. From *Wilcox*, the possession of the land passed through several hands to the defendant, who was in possession when this suit was brought.

*SAVAGE*, CH. J., *delivering the Opinion of the Court*, said; "The testimony of the defendant consists of the facts stated by *Halstead*; that he purchased the possession of 50 acres of the same lot; and of the deed from *Sitzer* to *Wilcox*. By this deed, *Sitzer* conveys to *Wilcox*, his heirs and assigns, all the right of the grantor, to the possession and improvements of the farm in question; and covenants that he is lawfully possessed of the premises, as the same are truly granted.

"This deed is one link in the chain of the defendant's title. The farm has been held under it ever since its date, *November* 16th, 1785; and without doubt the defendant is protected by that deed, and his possession under it; from the claims of any person, upon the facts as they appear in this case. It was not accompanied with any declarations, as in *Jackson vs. Frost*, (5 Cowen, 346,) which showed the absence of right or title. The grantor conveys the possession forever. He does not say that he conveyed a fee; but such must have been the intent. The deed is inartificially drawn; but if we apply the rule laid down by Lord Mansfield, (Cowp. 600.) 'that deeds shall operate according to the intention of the parties, if by law they may,' there can be no doubt that it carried a fee. The intention of the grantor was, to pass his title; and he supposed himself to have an estate of inheritance. (And Vid. 3 Dall. 477.)"

Judgment for the Plaintiff.

In the case of *Alexander & Al. vs. Pendleton*, (8 Cranch's Rep. 461.) *MARSHALL*, CH. J. *delivering the Opinion of the Court*, said; "But as the contract does not appear on the title papers, but was verbal, a purchaser for a valuable consideration could not be affected by it unless he was a purchaser with notice. Finding *Parthenia Dade* in the quiet and undisturbed possession of four hundred acres of land, forming a parallelogram, limited on the west by the line north 6 west, he had a right to consider that line as established, so far as respected the land of *Parthenia*. He was not bound to know that a private parol agreement existed, which would control the possession. This trust therefore no more passed with the land to *Hartshorne*, than would any other secret trust of which he had no knowledge."

"The various suits which have been instituted by, and against the ancestors of the appellants cannot affect this cause. A suit not prosecuted to a decree or judgment is not constructive notice a person not a pendente lite purchaser; and were the law otherwise, those suits, until that instituted in 1796, would convey no notice of the private agreement made in 1741. A knowledge of the suits therefore would not imply a knowledge of the trust; and possession for fifty years, though with knowledge of a better title, if adversary, constitutes a good defence against that title.

"In 1796, Charles Alexander instituted a suit against sundry persons claiming the land in controversy for the purpose of altering the boundaries which had been held by Parthenia, and those claiming under her, from the year 1732, and which had been surveyed under an interlocutory decree made by the Court of Chancery, in the year 1741. In defending themselves against this claim, the purchasers of this land had a right to unite the possession of Parthenia Dade to their possession, without being affected by a secret trust of which they had no notice."

Where the tenant in tail had executed a conveyance in fee, and his grantee had entered and remained in peaceable and undisturbed possession more than seven years after the death of the grantor, and the plaintiff being under no disability; *Held*, that the possession was protected by the Statute of Limitations. *Wells vs. Newbold, Taylor's Rep.* 197.

And the title under colour of which, the adverse possessor holds, must be adverse to, and different from that of the true owner; for if such adverse possessor claim that identical title as his own, and found his possession thereupon, and it turns out that he has not obtained it, his possession will not be deemed adverse to the lawful owner of that title

Where A. entered into possession of land in 1770, and in 1786 received a deed from his father and mother for the Land, but which was not acknowledged by the mother, to whom the title belonged by inheritance; it was held that the acceptance of the deed was sufficient to repel the parol evidence that A. entered adversely to his mother's title, or if his possession had been adverse to that time, it ceased to be so, on accepting the deed, and he was deemed to hold under the deed such interest as his father held, that is an estate for life; and that on the death of the father the estate reverted to the mother or her heirs. *Jackson ex dem. Sinsabaugh & Al. vs. Sears*, 10 Johns. Rep. 436, 441. Cited and confirmed, in *Jackson ex dem. Stevens vs. Stevens*, 16 Johns. Rep. 116; and *Jackson ex dem. Corson & Sebring vs. Cairns' & Coles*, 20 Johns. Rep. 301.

*In Jackson ex dem. Stevens vs. Stevens*, (16 Johns. Rep. 116.) SPENCER, J. who delivered the Opinion of the Court, said; "It was objected that the deed from Briggs and wife to Ebenezer Stevens was void, on the ground that Samuel Stevens held adversely. It will be observed, that he was dead when this deed was given, and that Ebenezer Stevens had succeeded as tenant in common with his widow, under the will, to an undivided portion of the estate; and it may well be doubted, whether a deed which he took when actually entitled to a part of the estate can be said to be adverse. But there is another decisive answer: Samuel Stevens, accepted a deed from Briggs and his wife, and he held under it such a right as the deed conveyed. That right was only the interest which Briggs had in the premises, as his wife never acknowledged the deed, until several years after the death of Samuel Stevens; Briggs' interest was an estate for life, *jure uxoris*. The possession of Samuel Stevens was not then adverse to the right of Briggs' wife. (10 Johns. Rep. 441.)"

The case of *Boehm & Shitz vs. Engle* (1 Dallas' Rep. 15.) was an action on the case. The plaintiffs under a power in the will of Henry Bolster, deceased, had sold at public vendue to the defendant, a house and lot in the City of Philadelphia, for £802, and shortly after tendered him a deed for it, which the defendant refused to accept, being advised by council that Bolster had no good title to the lot. Upon which the plaintiffs brought a special action on the case for the consideration money.

On the trial, in support of Bolster's title the plaintiffs produced a patent to Jane Batchelor, dated 1694, and a deed from one Richard Tucker (who had married Jane Batchelor,) to John Chambers, dated 1685, and deduced a regular title from Chambers down to Bolster. The plaintiffs acknowledged the defect in the title, in Tucker's conveying his wife's estate without her joining in the deed, but insisted on sixty years possession as giving a good title under the statute of 32 H. 8. c. 2. Held that the statute of 32 H. 8. c. 2. did extend to Pennsylvania, and that the plaintiffs were entitled to recover.

*In Slade vs. Griffin*, (2 Hayw. 178.) M'KAY, J. said, "Admitting the plaintiff's patent covers the whole land, the defendant's title also covers a part of it, and of this part the defendant has been in possession for more than 7 years. The plaintiff has been in possession all along of part of the land covered by his patent, but not in the actual possession of any part within the defendant's deed, and in such case the Act of Limitations is a bar to the plaintiff." & *Vide Sawyer vs. —*, 2 *Ibid.* 235. *Larkins vs. Miller*, 2 *Ibid.* 345.

In the case of *Dufour vs. Camfranc*, (11 *Martin's Rep.* 715.) the defendant prescribed under a Sheriff's deed; the Court said, "The title presented here is perfect as it respects form; it pursues the very words of the statute; the defect is a want of right or authority in the Sheriff to make such a conveyance, not a defect in the manner he made it. As nothing therefore appears upon the face of the deed which is defective, the knowledge of of want of right in the person who sold, is not brought home to the vendee, and his Error was one of fact not of law. It is difficult to see where is the difference between this case and an ordinary one of sale, where the purchaser acquires, from a person who has no title, by a regularly executed act, before a notary public; in such case the buyer acquires none, but he has that good faith which enables him to plead prescription."

In the case of *Jackson ex dem. Corson & Sebring vs. Cairns & Coles*, (20 *Johns. Rep.* 301,) it appeared, that *Jacob Corson* died seised and possessed of the premises in question, and other real estate, in 1772, leaving three children: *Mary*, the wife of *John Simonson*; *Cornelia*, wife of *Ernest Linder*, and, after his death, wife of *James Duffie*; and, after his death, wife of *Gozen Ryers*; and *Elizabeth*, wife of *Jacob Sebring*. *Mary*, the wife of *Simonson*, died in 1779, leaving two children, *Cornelia*, one of the Lessors of the Plaintiff, and *John Simonson*, who was living at the time of the trial. *Cornelia*, at the age of 19 years, married *Daniel Corson*, in 1791, from whom she was legally divorced on the 4th of December, 1810, by a decree of the Court of Chancery, dissolving the marriage. *Cornelia* the daughter of *Jacob Corson*, and afterwards the wife of *Gozen Ryers*, but before her marriage with him, and whilst she was the wife of *Duffie*, occupied with her then husband, the premises in question. On the 23d of January, 1788, being then the wife of *Gozen Ryers*, she and her husband executed a deed to *Terence Reilly*, for one half of all the lands, &c. of which *Jacob Corson*, Junr. died seised; this deed was never acknowledged by Mrs. *Ryers*; and on the 30th day of the same month, in the same year, *Terence Reilly* re-conveyed the same premises to *Gozen Ryers*. On the 21st of September, 1792, *Gozen Ryers* executed to the new loan officers of the county of *Richmond*, a mortgage of the premises in question. On the 13th of July, 1795, Mrs. *Ryers* died without issue. On the 5th of June, 1800, *Gozen Ryers* executed a mortgage of the same premises to *Richard Waln*, to secure the payment of 2000 dollars. In January, 1802, *Gozen Ryers* died. Before the death of Mrs. *Ryers*, her sister *Elizabeth*, one of the lessors of the Plaintiff, married *Jacob Sebring*, Junr.; he died on the 4th of August, 1803. The mortgage from *Gozen Ryers* to *Richard Waln*, was foreclosed and sold under a decree of the Court of Chancery; *Cairns* became the purchaser, for the sum of 6300 dollars, and on the 5th August, 1805, received a deed of the premises from a master. On the 3d of April, 1808, *Cairns*



paid off the mortgage from *Gozen Ryers* to the new loan officers of the county of *Richmond*.

It was proved, that *Gozen Ryers* was in possession of one half of the *Corson* property, including the premises in question, from the time of his marriage with *Cornelia*, until his death; and that *John P. Ryers*, (his son, by a former marriage,) held possession of it, until after the sale of it to the Defendant, *Cairns*. *Gozen Ryers*, claimed the property as his own, by purchase from *Terence Reilly*; and such claim was asserted before and after the death of his wife. *Cairns* had been in possession since the sale to him. The other half of the *Corson* property had been held by *John Simonson*, and those claiming under him, for many years, and as far back as the witnesses could remember. *Gozen Ryers* built several houses on the part possessed by him, in one of which *J. Johnson* lived in 1796.

The Defendants set up an adverse title and possession.

SPENCER, Ch. J. who delivered the Opinion of the Court, said;

"It was decided by this Court in the cases of *Jackson vs. Sears*, (10 *Johns. Rep.* 435,) and *Jackson vs. Stevens*, (10 *Johns. Rep.* 110,) that a grant in fee by the husband and wife, of the wife's lands, the deed not being acknowledged by her according to the Statute, passed only the husband's interest, and that the estate, after his death, reverted to her and her heirs. At the common law, the alienation of a husband, who was seised in right of his wife, worked a discontinuance of her estate. This was remedied by the Statute of 32 H. VIII, Ch. 28, s. 6, and which has been re-enacted here, (1 *Greenleaf's Ed. L. N. Y.* 393,) and continued in the successive revisions of the Statutes. The Act was passed the 3d of March, 1787. The 2d Section declares, that no fine, feoffment or other act, made or done by the husband only, of lands, the inheritance or freehold of the wife, during coverture, shall work a discontinuance, or be prejudicial or hurtful to the wife, or her heirs; but that the wife, and her heirs, shall and may enter into all such lands, and hold the same according to their rights and titles therein, as if no such fine, feoffment or other act had been done.

"The deed to *Reilly*, in January, 1788, although the wife joined in it, was not within this Statute, for it was an Act entirely null and void as to her. The Statute intended where the conveyance was to divest her right, that she should aliene according to law, that is, by a deed acknowledged by her, before a magistrate thereto authorized. That deed then, operated only as a deed from *Ryers*, and did not divest the right of his wife, or his heirs.

"When, therefore, *Reilly* re-conveyed to *Ryers*, the latter acquired no new right, but was merely re-invested with his former estate, the right to the possession during the coverture. The mortgage to the new loan officers, in 1792, by *Ryers*, is open to the same remarks. It had no effect on the wife's rights.

"It becomes wholly unnecessary to consider the effect of *Ryers'* mortgage to *Waln*, in *June*, 1800, for this action was brought within seventeen years thereafter.

"*Cornelia Ryers* died in *July*, 1795, and it becomes a question, whether the continuance of *G. Ryers* in possession from that time until his death, in *January*, 1802, acquired the character of a hostile and adverse possession *as against the heirs of his wife*. It is asserted by the Defendant's counsel, that his possession became hostile and adverse immediately after the death of his wife, and they rely on the fact of his having erected buildings on the premises as early as 1796, and his claiming the premises to be his property.

"We must consider *Mrs. Ryers*, as entitled to that part of the *Corson* estate which she possessed before her marriage with *Ryers*, and which he possessed during the coverture, and afterwards in severalty. There is no evidence that the co-parceners ever made partition, but the undisturbed possession of one moiety of the *Corson* estate by *Simmons*, and of the other by *Mrs. Ryers* and her husband, authorizes a presumption of a release among the co-parceners.

"As to *Elizabeth Sebring*, she was married to *Jacob Sebring*, before *Mrs. Ryers'* death. *Sebring* died in 1803. Unless, then, *G. Ryers* merely continuing in possession after the death of his wife, in 1795, claiming the premises as his, and erecting buildings thereon, constitutes an adverse possession, there is nothing to bar *Mrs. Sebring's* right to recover. It is observable, that *G. Ryers* made no conveyance of the premises after the death of his wife, until the 5th of *June*, 1800, when he executed a mortgage to *Waln*. I put out of view the deed to *Reilly*, and his conveyance to *G. Ryers*, as void and nugatory acts; *Ryers* must be considered as holding and enjoying the premises in consequence of his marital rights, and he was a tenant at sufferance after the death of his wife. "An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all." (2 *Bl. Com.* 149.) "And this estate may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger, and the reason is, because the tenant being once in by a lawful title, the law, which presumes no wrong in any man, will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act such as entry is, will declare his continuance to be tortious, or, in common language, wrongful." (2 *Bl. Com.* 149, 150.) We perceive, then, that *Ryers'* continuance in possession after the termination of the estate he held in right of his wife, was a tenancy at sufferance, not tortious as re-

"garded the true owners, and, consequently, not hostile or adverse to their right. His claim of title and building on the premises, can have no effect, for it does not appear that this was ever brought home to the knowledge of the lessors. I do not mean to admit, that had the claim been known to them, that a mere claim of title by a tenant at sufferance would create a disseisin, or a possession adverse to the true owner. It is unnecessary to decide upon the operation of the mortgage by *Ryers* to *Wain*, in 1800, or whether that constituted an adverse possession, although I am of opinion it did not; and that there never was an adverse possession until *Cairns'* entry, subsequent to the sale in 1805."

"I have been more particular in stating the reasons of the decision of the Court in this case, than was necessary, as all the principles were decided by this Court upon a state of facts between the same lessors and *Cairns*, on a former occasion, but that decision was not reported. We then decided, that *Ryers'* continuance in possession was not adverse, and that the lessors were not barred by the Statute of Limitations."—& *Vide Doe ex dem. Milner vs. Brightman*, 10 *East's Rep.* 583.

Where A. bought land in 1782, and put B. one of his sons, in immediate possession, and declared he had bought it for him, and afterwards died in 1789, leaving several children, his heirs at law, and B. continued in possession of the land above 27 years, but without having obtained a deed from his father: it was *Held*, that B. was in possession under his father, and not in his own right, or adversely to his father; and that the rest of the children of A. were entitled to their proportion of the land so occupied by B. *Jackson ex dem. Bromley & Al. vs. Benjamin*, 8 *Johns. Rep.* 101.

The will of a husband does not pass his wife's land, and no possession of the same by a devisee under the will, can create a presumption of title, or become adverse to the true owner. *Bowie vs. O'Neale & Al. Lessee*, 5 *Harr. & Johns. Rep.* 226.

2nd. An adverse possession must be hostile in its inception; must be marked by definite boundaries; must be an actual occupancy, positive notorious, uninterrupted, and continued for the space of time required by the Statutes of Limitations, in order to toll an entry.

That an adverse possession may be a bar, strict proof is required that it was hostile in its inception, and had continued so for 20 years; and the possession must also be marked by definite boundaries. *Brandt ex dem. Walton vs. Ogden*, 1 *Johns. Rep.* 156. *Gay vs. Moffit*, 2 *Bibb's Rep.* 507. *McGee vs. Morgan*, 1 *Marsh. Rep. (Ky.)* 62.

The rule, that an adverse possession, to bar an ejectment, must

be hostile in its inception, and continue so for 20 years, does not apply to the entry of the tenant; but to the act by which the possession becomes adverse. *Jackson ex dem. Krom vs. Brink*, 5 *Cow. Rep.* 483.

An entry adverse to the lawful possessor is not to be presumed. It must appear by proof. *Jackson ex dem. Gansevoort & Al. vs. Parker*, 3 *Johns. Cas.* 124.

The plaintiff claimed the premises in question as heir at law of his father, and clearly made out a good title in his father; THE COURT, said, "It was incumbent on the defendant to shew, that that title had been defeated by an adverse possession agreeable to the Statute of Limitations, during the father's life-time. This title by possession so as to defeat a grant, or other legal conveyance, is never to be presumed; but must be actually proved and shewn, in order to rebut a prior title, in the same manner, and with the same degree of precision, as plaintiff must shew a clear title in him, before he can recover." *Rockell, Ads. Holmes*, 2 *Bay's Rep.* 491.

It is a settled rule that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favour of possession in subordination to the title of the true owner. And if a person enters without pretence of title, his possession will be deemed the possession of the true owner. *Jackson ex dem. Bonnell & Al. vs. Sharp*, 9 *Johns. Rep.* 167.

"And wherever an adverse possession is relied on, it seems that there should be some proof of an actual ouster, for presumption of adverse possession from circumstances shall scarcely be deemed sufficient." 2 *Esp. Ni. Pri.* 9. (*Old paging*, 435.)

A claim and colour of title sufficient to destroy all presumption that the defendant is in possession under the plaintiff, is adverse. *Jackson ex dem. Dunbar & Al. vs. Todd*, 2 *Caines' Rep.* 183. & *Vide Jackson ex dem. Putnam & Al. vs. Bowen*, 2 *Caines' Rep.* 358.

Whether a possession claiming title, under a parol gift of land from the owner, is such an adverse possession as will bar an ejectment? *Quære.* *Jackson ex dem. Bradt & Al. vs. Whitbeck*, 6 *Cow. Rep.* 632. *Jackson ex dem. Young & Al. vs. Ellis & White*, 13 *Johns. Rep.* 120.—*Sed. Vide Jackson ex dem. Van Allen vs. Rogers*, (1 *Johns. Cas.* 33.) Where it is decided, that such a possession is not adverse to the grantor, and that the grantee was merely a tenant at will.

"In order to gain a title by possession under this act [*Statute*

of *Limitations of North Carolina*] these circumstances must concur—he must be possessed of land which hath been actually granted; a possession of vacant lands will not do, unless attended with such circumstances as required by the late Act of Assembly for limiting the claim of the State—he must take possession with a belief that the lands possessed is his own, as under a patent, or deed under some patentee—he must take possession with such circumstances as are capable in their nature, of notifying to mankind that he is upon the land, claiming it as his own, as in person or by his tenant—this notorious possession must be a continued possession—a secret taking possession, and not continuing it, as it cannot answer the purpose of notoriety, to adverse claimants, cannot extinguish their claim for having not been put in in due time.” “A single act of taking possession and then leaving the land will not do;” “The possession that is capable of ripening into title, must be notorious, and continued for seven years without entry, claim or action, on the other side.”—*Den ex dem. Andrews vs. Mulford*, 1 *Hayw. Rep.* 320, 321. & *Vide Den ex dem. Park vs. Cochran & Al. Ibid.* 180. *Den ex dem. Stade vs. Smith, Ibid.* 249. *Borrets vs. Turner*, 2 *Ibid.* 114.

Possession of lands for seven years under colour of title bars the right of entry, although the possessor knew at the time he obtained his colour of title and took possession, that the lands belonged to another person. *Den ex dem. Reddick & Uz. vs. Leggat*, 3 *Murph. Rep.* 539.

But in the case of *Miller & Al. vs. Shaw*, 7 *Serg. & R. Rep.* 136. GIBSON, J. said; “The truth is, that the Statute [*of Limitations*,] was never intended as a means of acquiring title, or “as an encouragement to people to enter on each other’s land “with a view to hold it; but to compel them to decide their controversies while transactions are recent and the evidence of “them is attainable; and there its operation in protecting a “possession under a bad title, or no title at all, is but a consequence of the object of its enactment, and not the object itself.”

And in the case of *Den. ex dem. Jones vs. Ridley*, (2 *N. Car. Law Rep.* 400.) TAYLOR, CH. J. delivering the Opinion of the Court, said; “But a possession for this period can only meet the “spirit and design of the law, [*the Statute of Limitations*,] when “it is unbroken and uninterrupted; for as it is founded on the supposition that the possessor really believes he has title, this idea “is weakened rather than confirmed, by his occasionally withdrawing from the possession, and leaving the land without “cultivation, without occupancy, and without a tenant.” & *Vide McIver & Al. vs. Ragan & Al.*, 2 *Wheat. Rep.* 29. *Jack-*

*son ex dem. Ten Eyck & Al. vs. Frost*, 5 Cow. Rep. 351; (both cited ante page 381.)

"In New-Jersey, the action of ejectment has always been considered on the same footing with a writ of right, it has been too solemnly settled to be now disputed, that the Statute of James (Stat. 21 Jac. 1 c. 16. 3 Ruffhead, 100.) does not extend here; and therefore all the legal consequences arising from that Statute, one of which is that twenty years adverse possession, like a descent cast, tolls an entry, falls to the ground." *Deths ex dem. Bickham vs. Pissant & Lardner*, 1 Coxe's Rep. 222.

*It must be marked by definite boundaries.*

In the case of *Jackson ex dem. Hardenberg & Al. vs. Schoonmaker*, (2 Johns. Rep. 234.) KENT, Ch. J., who delivered the Opinion of the Court, said,

"The possession fence, as it was termed, which was run round the large tract in 1774, I do not consider as an adverse possession, sufficient to toll the right entry of the true owner, after twenty years. This mode of taking possession is too loose and equivocal. There must be a real and substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title." (The possession fence, in this case, was made by felling trees, and lapping them one upon another round the land.)

An adverse possession of more than 20 years without any demarcation or defined boundary, but on land which is afterwards included in a survey and patent, neither of which were of 20 years standing at the commencement of the suit, furnishes no available defence in an Ejectment. *Shearer & Brooks vs. Clay*, 1 *Littell's Rep.* 260.

A naked possession, (possession without right,) is adversary only to the extent of actual enclosures. *Hammond & Al., Lessee vs. Warfield*, 2 *Harr. & Johns. Rep.* 151.

A possession of more than twenty years, when taken before the survey or patent, is limited by the actual close. *Brooks & Al. vs. Clay*, 3 *Marsh. Rep. (Ky.)* 545.

When an usurper enters on land he acquires possession inch by inch, of the part which he occupies. The possession of one who shews no title, when the extent of it is not shewn to have reached within a mile of the *locus in quo*, cannot be considered a possession of it. *Prevost's heirs vs. Johnson & Al.* 9 *Martin's Rep.* 123.

In the case of *Jackson ex dem. Teed & Al. vs. Halstead*, (5 Cow. Rep. 219, 220.) the Opinion of the Court was delivered by WOODWORTH, J.; he said; "The plaintiff is entitled to recover the small parcel of land lying between the 2 acres and 17 rods and the river; unless the deed from *Palmer to Jennings* is inoperative, in this respect by reason of an adverse possession at the time it was executed. The boundaries in the defendant's conveyance do not include this parcel. He cannot, therefore, rest on the ground of a good constructive possession; but must make out a *pedis possessio*, or actual occupancy, with claim of title. The adverse possession must be marked by a substantial enclosure, and continued down, to render it available. (2 Johns. Rep. 234. 10 Id. 477. 1 Id. 156. 1 Cowen, 285.)" "From the whole of the evidence I understand that the small parcel was enclosed by a fence on all sides, excepting on the northerly line, where it extended a part of the way only; and at that portion of the line where it did not continue, the high bank served as a substitute. For the purpose of notoriety, as well as good husbandry, this was a substantial enclosure. Why require a fence, where nature had formed a sufficient barrier, to prevent the intrusion of cattle? The Defendant sufficiently marked the extent of his possession. Suppose a lot of land is bounded on the one side by a navigable river, or a continued ledge of rocks, or a mountain of difficult ascent or descent, and that the other sides are well enclosed; would not this with a claim of title, constitute an adverse possession? it certainly would; because in such a case every thing had been done, that could reasonably be required to protect the crop, or denote exclusive occupancy. The case before us is analogous. The Defendant's possession was adverse when *Palmer* assigned to *Jennings*; and so continued to the time of commencing the action."

In the case of *Cheney vs. Ringold & Al.* (2 Harr. & Johns. Rep. 87, 94.) BUCHANAN, J. delivering the Opinion of the Court, said;

"This is a case of two conflicting claims, in which the pretensions of both parties are set out. The lessors of the plaintiff with title, having possession by enclosure and cultivation of a part of the tract of land in dispute, claiming the whole; and the defendant without title, having possession by enclosure of a part of the same tract of land, with the use (by cutting timber, &c.) of other parts not enclosed. As to that part of the land which was in the possession of the defendant, and his ancestor, *Charles Cheney*, by actual enclosure for more than twenty years next preceding the bringing of this suit, the plaintiff is bound by the act of limitations; but not as to the parts used by the defendant exterior to the enclosure."

Where the Defendant in an action of Ejectment, was in possession of 100 acres of land, by enclosures and cultivation, for 15

years, and then enlarged his enclosures so as to include 150 acres, and he possessed the same, so enlarged by enclosures for six years thereafter, claiming the same as his own. *Held*, that he had title to the 100 acres by adversary possession. *Hall vs. Gitting's Lessee*, 2 *Harr. & Johns. Rep.* 380.

*It must be an actual occupancy, positive, notorious, uninterrupted; and continued for the space of time required by the Statutes of Limitations.*

Upon an unoccupied island in the river Delaware, one *Gould*, built a small house which was called his Study, in which he kept a table and some books, and occasionally repaired there for the purpose of studying. There was no evidence that he ever slept there, but his family resided on his property on the adjacent shore. *Gould* made no further improvements on the land, and some time previous to his death, he removed the study away from the island. During the whole period in which he held this possession, the neighbors were in the habit of driving their cattle on the island, and no exclusive appropriation was claimed by any one. It appeared that a possession of a similar kind continued in *Gould's* widow and children after his death in 1748, until some time in the year 1755, when, as it was alleged, one *Logan* ousted *Gould's* family from the possession, and he, and those claiming under him, had ever since retained it. The lessors of the Plaintiff claim under *Gould*, by virtue of a deed dated in March, 1786, from the heir at law of *Gould*, to *Samuel Tucker*; this conveyance recited a preceding one, made in the year, 1776, which it was alleged, had been captured by the British, and lost or destroyed. Upon this evidence the Plaintiff rested.

The defendant relied upon a possessory right under *Logan*, who it was proved, had possession of the property in 1755, built a house upon it, fenced and improved it. A paper was produced, purporting to be articles of agreement between *William Logan* and *Henry Bristol*, dated September 6, 1766; by which *Logan* conveyed all his right, improvements and possession, but the instrument was without seal. *Bristol* conveyed to *Ridley*. *Ridley*, January 18, 1775, conveyed his title to this property and some other things, to *William Yardley*, for a valuable consideration; *Yardley* conveyed to *John White*, the defendant, in 1776, for a valuable consideration. This paper title of the defendant had always been accompanied with the possession. *Held*, that "the facts proved were sufficient evidence of an adverse possession, at least from 1776, (35 years before the trial) in the defendant and those under whom he claimed title, to bar the plaintiff's suit. *Denn ex dem. Tucker & Uz. & Al. vs. White*, 1 *Coze's Rep.* 94.

In the case of *Shannon vs. Kinney & Al.*, (1 *Marshall's Rep.*



(Ky.) 4.) There was a continual adverse possession for more than twenty years, but it appeared that *Hugh Shannon*, who first took the possession of the land in controversy, before he had been in possession twenty years, surrendered the possession to the defendants or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim, and that they had not had the land in possession 20 years prior to the commencement of this suit. The Court *Held*, that this circumstance would not prevent the Statute of Limitations from operating as a bar to the plaintiff's recovery; that an adverse possession for twenty years would toll his right; and that it could not, "in the reason and nature of the thing, produce any difference, whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor whether the possession be held by the same or a succession of individuals, provided the possession be a continued and uninterrupted one." & *Vide Hord vs. Walton*, 2 *Ibid*, 620.

In the case of *Lessee of Potts vs. Gilbert*, decided in the circuit court of the United States for the third circuit, and reported in the 1st vol. *Hall's Journal of Jurisprudence*, 255, 256. *WASHINGTON J.*, in charging the Jury, said;

"The adverse possession before mentioned must not only continue, but it must continue the same in point of locality during the prescribed period of time sufficient to constitute it a bar; that is to say, a roving possession from one part of a tract of land to another cannot bar the right of entry of the owner upon any part of the land which had not been held adversely for twenty-one years, although the different periods of possession of the separate parcels should amount in the whole to that number of twenty-one years. For it is a clear principle of law, that the right acquired by adverse possession of a disseisor or other, who enters or retains possession by wrong, can never extend beyond the limits of the particular spot to which his occupation was confined. If he could go beyond those limits, there would exist no other to circumscribe his claims. He cannot resort to the metes and bounds of the tract upon which he has settled, because the legal possession of the owner continues unaffected by the tortuous entry; except so far as the actual adverse possession has disturbed this, the legal owner is constructively in possession of the whole tract, because his title extends to the whole. A wrongdoer can claim nothing in relation to his possession by construction."

"The court is perfectly clear that, where different persons enter upon land in succession, each retaining the possession for a period short of twenty-one years, the last possessor, who may be the defendant, cannot tack the possession of his predecessors to his own, so as to make out one entire continuing possession of twenty-one years, to bar the entry of the owner. The possession of

A. the first occupant, cannot be the possession of B. the next occupant, because the moment A. quits the actual possession, the legal possession of the real owner is restored, and the entry of B. constitutes him a new disseisor, and if he seek to bar the entry of the owner, he must show an actual adverse possession continued in himself for twenty-one years.

There is in truth no privity between A. and B.

Neither do we think that the present case is strengthened in favour of the defendant by the evidence of the witness, who states that the several occupants sold to their successors. Nothing can be more vague than this testimony. It does not state that any conveyances were executed or what each person sold; whether it was title, possession, or good will; or whether any two of the sales were applicable to the same spot. Indeed, what had any of them to sell?

Not only is adverse possession to bar an entry to be confined to the particular parcel so occupied, but some evidence should be given to show the location of such parcel, that it may be seen whether the continuity of possession during the whole period was applicable to it."

The undisturbed possession of part of a tract of land, without title, is no evidence that the persons holding such possession claimed the whole tract. *Corporation, &c. vs. Hammond*, 1 Har. & Johns. Rep. 580, 603.

In the cases of *Doe ex dem. Clinton & Al. vs. Campbell & Al.*, (10 Johns. Rep. 477.) THE COURT, after discussing the plaintiff's title, said; "The remaining point in the case is, whether any title superior to this was shown on the part of the defendants, or any bar to the action by means of adverse possession. In the suit against *Campbell* there was no possession of 20 years pretended; and the possession which one *Smith* commenced about 25 or 26 years before the trial, and under colour (as it was to be presumed) of a deed from one *Hake*, was on the farm occupied by *Elliot*. No other possession of 20 years standing was shown, and consequently, the defence of 20 years adverse possession could only apply to the suit against *Elliot*. And in the suit against him the adverse possession is unavailing. The possession commenced by *Smith* consisted only of a small clearing of 5 or 6 acres, and it is not ascertained in what part of *Elliot's* farm it was to be located. But the decisive objection to this defence is, that no regular deduction of title, or privity and continuity of possession, was shown and deduced down from *Smith* to *Elliot*, or to any of the other defendants. Adverse possession must be marked by definite boundaries, and be regularly continued down

"to render it availing. (*Brandt. vs. Ogdens*, 1 *Johns. Rep.* "156.)"

An adverse possession, is, "a possession under colour of title, taken by a man himself, his servants, slaves or tenants, and by him or them continued without interruption for seven years together." *Grant vs. Winborne*, 2 *Hayw. Rep.* 57.

Actual ouster, and adverse possession, of any lands, tenements, or hereditaments, for fifteen years after the title, or cause of action accrued, and before suit brought, bars the plaintiff of his right of entry thereafter, whether the ouster and adverse possession be by the same person or persons, for the whole term of fifteen years, or by different persons for different periods, making fifteen years in the whole; provided the disseisin and adverse possession have been continued and uninterrupted; and provided, that the plaintiff does not come within any of the exceptions mentioned in the provisos of the Statute, extending the term of time, in which entry may be made. *Fanning vs. Wilcox & Palmer*, 3 *Day's Rep.* 269.

To make out an adverse possession, the defendant must prove actual possession by enclosure of the tract which he claims, for upwards of twenty years. *Gibson vs. Martin*, 1 *Har. & Johns. Rep.* 545.

Twenty years possession, under a vague unsurveyed entry, affords protection, as an adverse possession, only to the extent of the actual close. *Henderson vs. Howard's devisees*, 1 *Marsh. Rep. (Ky.)* 26.

The settlement required by the Statute, limiting the time of bringing suits against actual settlers, is a settlement and residence on the land; clearing and cultivating the land is not sufficient.—*Hog. vs. Perry*, 1 *Littell's Rep.* 171. *Smith vs. Nowells*, 2 *Ibid.* 160. *Hite's heirs vs. Shrader*, 3 *Ibid.* 446. & *Vide Skyles' heirs vs. King's heirs*, 2 *Marsh. Rep. (Ky.)* 385. *Anderson vs. Turner*, 3 *Marsh. Rep. (Ky.)* 133. *Bodley vs. Coghill's heirs & Hord*, *Ibid.* 615. *Moore vs. Farrow & Al.*, *Ibid.* 49.

To prevent the recovery in Ejectment by a Plaintiff having title, it is "necessary to shew on the part of the Defendant, an actual and continued occupancy of the land in dispute, for twenty years; and most certainly the occasional cutting of timber upon the land, does not amount to such a continued occupancy." *Braxdale vs. Speed*, 1 *Marsh. Rep. (Ky.)* 106. *Smith vs. Mitchel*, *Ibid.* 207. & *Vide Trotter vs. Cassady & Al.* 3 *Marsh. Rep. (Ky.)* 366.

In the case of *Cheney vs. Ringgold & Al., Lessee*, (2 *Harr. & Johns. Rep.* 87, 95.) BUCHANAN, J. delivering the Opinion of the

Court, said; "Even if the defendant's possession by enclosure commenced first, which is not stated to be the case, that, and his cutting timber exterior to the fences, could not have prevented the constructive possession vesting by operation of law, in Jordan, of all the unenclosed parts of *The Number of Two*, on the actual entry and enclosure made by him, and those claiming under him, upon a part of that tract of land, within twenty years from the date of the grant, claiming title to the whole. But if the possession, by enclosure, of the lessors of the plaintiff, and those under whom they claim, commenced first, and for any thing appearing in the record that may have been the fact, solely no cutting, &c. by the Cheney's, exterior to their enclosures, could so divest the possession, cast by law upon the plaintiff, of the unenclosed parts of *The Number of Two*, as to let in the operation of the act of limitations."

The possession that will give a title under the Statute of Limitations, must be an actual occupancy, a *pedis possessio* definite, positive and notorious. *Bailey & Al. vs. Irby & Al.*, 2 Nott & M'Cord's Rep. 343.

Digging a canal and felling trees are not such acts of possession, as may be the basis of the prescription of thirty years. *Macarty vs. Foucher*, 12 Martin's Rep. 11. & *Vide Prevost's heirs vs. Johnston & Al.*, 9 Martin's Rep. 123.

"The occasional exercise of dominion, by broken and unconnected acts of ownership, over property which may be made permanently productive, is, in no respect, calculated to assert to the world, a claim of right; for such conduct bespeaks, rather the fitful invasions of a conscious trespasser, than the confident claims of a rightful owner." *Den ex dem. Jones vs. Ridley*, 2 N. Car. Law. Rep. 400. (Per TAYLOR, CH. J. delivering the Opinion of the Court.)

But in the case of *Robinson vs. Swett & Al.*, (3 Greenl. Rep. 315, 319.) it was said, that the lands in dispute, "being wild and uncultivated, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them; but that facts and conduct on the part of a person exercising acts of ownership and claiming, adversely, title and possession, would amount in law to possession of the land, and disseisin, if known and acquiesced in by him who has the right; when if unknown and not acquiesced in by such party, they would not amount to such possession and disseisin, but only to successive trespasses."

Where the owners of contiguous lands "have established a fence varying from the line described in the deeds, and each party

has held and occupied up to his side of the fence, claiming to hold accordingly, for twenty years; neither can maintain a possessory action against the other." "But where the parties have agreed upon a fence variant from the line, avowedly for convenience, and still have continued to claim according to the true line, neither party acquires a title, or even a right of possession against the other, merely on account of the fence." *Burrell vs. Burrell*, 11 *Mass. Rep.* 298.

If the defendant in ejectment set up the Act of Limitations, he must stand on his own possession, and cannot call in the possession of one whose title the plaintiff has purchased, to assist him. *Gluggage & Al. vs. Duncan*, 1 *Serg. & R. Rep.* 111.

"Residence is not necessary, to make an adverse possession. Land may be inclosed and cultivated without residing on it. And the possession is as much adverse in one case as in the other." *Johnson vs. Irwin*, 3 *Serg. & R. Rep.* 292.

A title by warrant and survey, without patent, is within the Act of Limitations of 26th March, 1784, [*Pennsylvania*] and is barred by an adverse possession of twenty-one years. *M'Koy vs. The Trustees of Dickinson College, (In Error)*, 4 *Serg. & R. Rep.* 302.

In the case of *Pederick vs. Searle*, (5 *Serg. & R. Rep.* 240.) *TILGHMAN*, Ch. J. delivering the Opinion of the Court, said; "Let us consider then, the force of the other reason urged by the plaintiff; that the possession having been delivered to the plaintiff by virtue of a recovery in a Court of Justice, the Act of Limitations was thereby avoided, because the continuity of the defendant's possession was broken. If the continuity of possession had been broken, before the expiration of 21 years, the period required to give effect to our Act of Limitations, the argument would have been good. An entry within the 21 years, destroys the efficacy of all prior possession, so that to gain a title under the Act of Limitations, a new adverse possession for 21 years must be had."

A possession to prevent a recovery, or vest a right under the Statute of Limitations, must be actual, continued, adverse and exclusive. An easement claimed out of the land of another, can never be the subject of such limitation, for it is not constant, exclusive, and adverse; but a continued exclusive possession and enjoyment, with the knowledge and acquiescence of the owner of the inheritance, for twenty-one years, would be evidence from which a jury might presume a right, by grant or otherwise, to such easement. *Croper & Al. vs. Smith*, 9 *Serg. & R. Rep.* 26.

Persons having a right of entry into land at the time of passing the Act of Limitations of the 26th March, 1785, are not barred by an adverse possession of 18 years from that time; there must be 21 years adverse possession to bar them of their right, whether their right existed before or arose after that act. *Packer's Lessee vs. Gonsalus, (In Error),* 10 Serg. & R. Rep. 147.

"Possession of land so as to produce a bar, must be an actual possession of some part in dispute. Cultivation of part of the defendant's claim, not within the bounds of the disputed part, is not sufficient to authorize the bar of the Statute." *Napier's Lessee vs. Simpson,* 1 Tenn. Rep. 453.

But it has been held, that a *constructive* adverse possession of a small tract of land, may be admitted where the Defendant has a paper title for such small tract, although he has been in the actual occupancy of only a part of such tract.

In Ejectment, the defence of 20 years adverse possession, in order to countervail a legal title, must be supported by 20 years actual occupancy, or a substantial enclosure of the premises by the Defendant, or by him and those through whom he derives title. A cultivation of *part* of the premises for that time, with a claim of title to the whole, will not constitute a defence beyond the portion actually improved. And even where such possession is under a deed or paper title, for a large tract of land (*e. g.* 783 Acres,) and only a small part is improved (*e. g.* 2 Acres,) with a claim of title to the whole, this will not constitute an adverse possession, beyond the actual improvement. And where one takes a deed, purporting to describe a tract of land; but which, by a mistake in the description, covers nothing; and the grantee, by occupation, takes possession of a part, and claims title to the whole of the supposed tract, under the deed, this is an adverse possession only as to the part actually improved. And, accordingly in *Jackson ex dem. Dervient vs. Loyd*, decided October Term, 1820, but not reported, where the Defendant had a deed for Lot 4, but took possession of Lot 5, adjoining, believing it to be Lot 4, and claiming it as such, and improving a part: it was *Held*, that his adverse possession, did not extend beyond his actual improvements. The doctrine of the constructive adverse possession of lands, by the cultivation of part, accompanied by a claim of the whole, under a deed, does not apply to large tracts of land, not purchased for the purpose of actual cultivation. The doctrine is in general applicable to a single farm, or lot of land, only, purchased for the purpose of actual cultivation. A constructive adverse possession, must be founded on a deed or paper title, though such title need not be a rightful one. *Jackson ex dem. Gilliland & Al. vs. Woodruff & Al.* 1 Cow. Rep. 376. & *Vide Miller, &c. vs. Dow,* 1 Root's Rep. 412.

If a Defendant in an action of Ejectment, prove that he or those under whom he derived title, purchased the whole of the lot demanded—took a paper title therefor—went into possession under that title, and cleared one acre more than fifteen years before the commencement of the Plaintiff's action, and that the possession has accompanied such title, notwithstanding such title should prove invalid, he will hold the whole lot under the Statute of Limitations. A possession of a part under such purchase, being a possession of the whole; is a bar to the action, *Doe ex dem. Pearsall vs. Thorp*, 1 Chipman's Rep. 92.

If a patentee enters upon part of the land in controversy, with an intention of possessing the whole, it shall be considered as a possession of the whole; but if he enters upon a definite part, with a view to possess such part only, his possession is confined to such part. *Bowman vs. Bartlett & Al.* 3 Marsh. Rep. (Ky.) 99. *Bodley vs. Coghill's Heirs & Hord*, Ibid. 615.

A lease of a small tract of land, *e. g.* 63 Acres, and an actual possession by the lessee, of a part, with a claim of title to the whole, constitutes an adverse possession of the whole.

And while it is so possessed, a conveyance, by any one except the adverse possessor, to another, of a part of the land so possessed, though it also include an adjoining parcel not so possessed, and the grantee enter upon the latter parcel, claiming to the whole extent of his conveyance, will not constitute the grantee, a constructive, or actual possessor, beyond the parcel on which he enters.

If one have constructive possession by color of title, and occupying a part; another cannot acquire a constructive possession to the same extent in the same manner; but though the latter enter on part, with colour of title to the whole, and claim the whole, his possession will be confined in extent, to the part which he actually occupies. *Jackson ex dem. Hasbrouck vs. Vermilyea*, 6 Cow. Rep. 677. & *Vide Calk vs. Lynn's Heirs*, 1 Marsh. Rep. (Ky.) 346.

A settler taking possession under one claim, without intending to intrude on another, but accidentally intruding, acquires no interfering possession out of his actual close. *Smith & Al. vs. Morrow*, 5 Littell's Rep. 210. *McKinny vs. Kenny & Al.* 1 Marsh. Rep. (Ky.) 460.

And this accidental and unintentional intruder selling his claim to another, (who holds an elder patent on the claim intruded on,) transfers no right of possession to his vendee, within the claim intruded on, except to the extent of the close. *McKinny vs. Kenny & Al.* 1 Marsh. Rep. (Ky.) 460.

The right of entry in an elder outstanding patentee, is not toll-  
ed by an adverse possession of more than 20 years of a part of the  
land covered by such elder patent, except so far as the adverse  
possession extended. *Voorkies vs. Bridgeford*, 3 *Marsh. Rep.*  
(Ky.) 27.

If an entry be made on a demarked survey, but before patent  
issues thereon, the possessor is in possession to the extent of the  
lands, and the limitation runs from the entry, and is not confined  
to the date of the patent. *Roberts & Al. vs. Sanders*, 3 *Marsh.*  
*Rep.* (Ky.) 29.

The holder of a descriptive warrant without survey, who has  
ascertained the limits of his claim by marked boundaries, taken  
up his residence on the land, cleared a large quantity and cultivat-  
ed and improved it, is in possession of the whole tract; and if a  
third person enters on a part of it, nothing short of 21 years ad-  
verse possession, will bar the entry of the warrant holder. Such  
a case is not within the meaning of the 5th Section of the Act of  
Limitations of 26th March, 1785. *Gonzalus & Al. vs. Hoover &*  
*Al.* 6 *Serg. & R. Rep.* 118.

But in the case of *Miller & others vs. Shaw*, (7 *Serg. & R.*  
*Rep.* 143.) DUNCAN, J. said; "A wrongful possession cannot be  
"extended by construction; constructive possession always ac-  
"companies the right. It is a contradiction in terms, that a man  
"by wrong, should have any right, and that this right, by wrong  
"should be extended by construction. There cannot be two con-  
"flicting constructive possessions, one in the owner and the other  
"in the trespasser. The right always draws to it the possession,  
"and it there remains, until seized by the wrong doer, whose pos-  
"session is strictly *possessio pedis*; who must necessarily be con-  
"fined to what he has grasped, his real and actual possession.  
"Beyond that, no length of time will protect him; because beyond  
"that, the owners possession has never been changed; it always  
"is in contemplation of law, continued in him. These are the  
"dictates of common sense, of common justice, and of the common  
"law. Did they need authority to support them, authorities  
"abound in the decisions of the Courts of the several states, and  
"of the Supreme Court of the United States." & *Vide Royer*  
*& Al. vs. Benlow*, 10 *Serg. & R. Rep.* 305.

Where a man enters on a tract of appropriated land, *without*  
*title, or colour of title*, the Act of Limitations will not protect  
him beyond his actual enclosures. *Farley & Al. vs. Lenox*, 8  
*Serg. & R. Rep.* 392.—*Davidson's Lessee vs. Beatty*, 3 *Har. &*  
*M'Hen. Rep.* 621.

An improver who enters upon land held by another by warrant



and survey, is protected after 21 years, by the Statute of Limitations as to all he encloses or cultivates without enclosure, but not as to those parts which remain in wood, and uninclosed; though he uses them for fuel, fences, &c. This is the general rule, but it seems there may be exceptions; such as the owners confessing himself out of possession of the woodland uninclosed: suffering the improver to pay the taxes for it: or perhaps the case of a piece of uninclosed woodland lying between two neighbouring cultivated parcels, might be left to the jury. There may perhaps be other cases of exceptions. *Royer & Al. vs. Benlow*, 10 *Serg. & R. Rep.* 303.

But where a large tract of land is divided into lots, the possession of one lot adversely will not create a constructive adverse possession of the other parts of the tract although claimed by the defendant under the same paper title.

In *Jackson ex dem. Ten Eyck & wife vs. Richards*, (6 *Cow. Rep.* 623.) The Opinion of the Court was delivered by SUMNERLAND, J., he said; "The judge decided correctly upon the subject of adverse possession: that the tract H. being a large tract of land subdivided into different lots, the occupancy of any one of the lots would not give a constructive possession, or create an adverse possession of other parts of the tract. (*Jackson vs. Woodruff*, 1 *Cowen.* 276.) and as lot number 12, the premises in question, was not actually possessed at the time of the marriage of the lessors of the plaintiff, there was no adverse possession to bar the right of the lessor *Ann Ten Eyck*. This question has been repeatedly decided by this Court. Indeed, the point was abandoned by the defendant's counsel upon the argument."

An alienee entering on his lands (which were bounded) gains a possession only to the extent of his limits, and that possession does not enure to the benefit of his alienor, or give him the possession of lands outside of the alienee's bounds. *Murray & Al. vs. Waugh*, 1 *Marsh. Rep. (Ky.)* 452.

A patentee extending shelter to an occupant, whose possession is meted and bounded, acquires possession only to the extent of the occupant's claim. *Lee vs. M'Daniel*, 1 *Marsh. Rep. (Ky.)* 234.

But, a landlord settling a tenant on his patent, with an intent to gain possession, (giving his tenant no bounds) is *ipso facto* in possession to the limits of his patent. *Ibid.* 234.

Lands not susceptible of alienation cannot be acquired by prescription. *Mayor, &c. vs. Magnon*, 4 *Martin's Rep.* 2.

Adverse possession to be effectual must be continued for the space of time required by Statute.

In the case of *Hall vs. Gittings, Lessee* (2 *Har. & Johns. Rep.* 112, 126.) CHASE, CH. J. said; "*Holland's park* having been legally granted to *George Holland*, nothing can defeat his title, and the title of his heirs, to the said land under his grant, but twenty years adversary possession."

The Act of Limitations runs in equity in favour of an adverse possession, where it would at law. *Harrison vs. Harrison & Al.*, 1 *Call's Rep.* 419. *Bell vs. Beemen & Al.*, 3 *Murph. Rep.* 273.

A bill in Chancery cannot be sustained to recover land from one who has been 20 years in possession prior to the commencement of the suit, and under a title from an adverse grant. *Wilson's heirs vs. Bodley*, 2 *Littell's Rep.* 55, 59.

The shortest period which a court of equity is bound to consider an absolute bar to a suit respecting real estate, in analogy to the limitation of actions at law, is twenty years. *Hawley vs. Cramer*, 4 *Cowen's Rep.* 718.

In the case of *Ward vs. Van Bokkelen* (1 *Paige's Rep.* 101.) WALWORTH, Ch. said; "If the conveyance was fraudulent, no period of time, short of twenty years, will prevent the persons intended to be defrauded thereby from pursuing their remedy against the land in the hands of the fraudulent grantee, or her heirs or devisees. Twenty years is the shortest limitation of actions at law respecting real property in this state, and by analogy to the Statute of Limitations, that is the shortest period which can bar a proceeding in this court to set aside conveyances of real property, on the ground of fraud."

Twenty years at least are required to bar the equity of redemption in cases of mortgages of a legal or equitable interest in real estate. *Slee vs. The Manhattan Company*, 1 *Paige's Rep.* 80.

Possession for more than twenty years under an adverse title, bars relief in equity, except where the complainants laboured under some disability. *Floyd's heirs vs. Johnson & Al.*, 2 *Littell's Rep.* 109, 112.

The Maryland Statute of Limitations of three years is a good bar to an action of assumpsit for money had and received brought to try a title to lands in the city of Washington, under the 5th section of the Act of Maryland of November, 1791, ch. 45. *Beatly's Adm'rs. vs. Burnes' Adm'rs.* 8 *Cranck's Rep.* 98.

In the case of conflicting *grants*, twenty years possession will not avail the defendant in chancery, unless he shews that he has obtained the elder grant for twenty years previous to the institution of the suit. *BOYLE, CH. J. delivering the Opinion of the Court*, said; "It is certainly a general rule, that a Court of Equity will "not relieve against a possession with right after the lapse of "twenty years. Whether this rule is applicable to controversies "like the present, growing out of original adverse claims, does "not seem necessary to be decided in this case. For we are of "opinion, that admitting it to be so, the case made out by the de- "fendants does not entitle them to avail themselves of it; for they "have not exhibited the grant under which they claim; nor does "the date of it appear from any part of the pleadings. It is in- "deed alleged by the complainant that it is elder than that under "which he derives title: but his bears date only about nine years "before the commencement of this suit. So that the grant under "which the defendants claim, though elder than that of the com- "plainants, may have been issued much less than twenty years "prior to the commencement of this suit; and it is plain that pre- "vious to the emanation of their grant, the complainant could not "maintain his suit: for it is that circumstance alone which gives "to a Court of Equity jurisdiction of the cause; and until the "cause of action arose, and the jurisdiction of the court attached, "laches cannot be ascribed to the complainant." *Briscoe, &c. vs. Prewet*, 4 *Bibb's Rep.* 370.

Twenty years' possession of an easement or use of a water course is a conclusive presumption of right, if unexplained. *Hazard vs. Robinson*, 3 *Mason's Rep.* 272. *Hurlbut vs. Leonard, Brayt.* 201.

An absolute right to a water course, may be acquired, by 15 years' uninterrupted possession, use, and occupation, claiming right thereto adverse to all others. *Rogers vs. Page & Al.*, *Brayt. Rep.* 201. & *Vide Hurlbut vs. Leonard, Ibid.* 202.

A right to a privilege appurtenant to land may be gained by an exclusive enjoyment for a sufficient length of time, in analogy to the Statute of Limitations; but no period short of that required by such Statute to gain a title to land will be sufficient for this purpose. *Sherwood vs. Burr*, 4 *Day's Rep.* 244.

If the grantor reserve to himself and his representatives, &c. a servitude or right of passage through the lands conveyed, *non user*, for twenty years, of such right or servitude, will entitle the grantee, or his representatives, to prescribe against it. *Powers vs. Foucher*, 12 *Mart. Rep.* 70.

Twenty years' adverse possession of a diverted water course are

indispensably necessary to defeat the proprietor of the ancient channel, and to repel his reclamation of his right. *Campbell vs. Smiths*, 3 *Halstead's Rep.* 139. *S. P. Coalter vs. Hunter*, 4 *Rand. Rep.* 64.

And if the use of the water "was originally applied for as a loan;" "granted without consideration as a loan; and its subsequent enjoyment never claimed otherwise than as a loan; more than twenty years' possession will not be adverse." *Coalter vs. Hunter*, 4 *Rand. Rep.* 64.

More than twenty years' adverse possession and exclusive use of the lands over which a party claims a right of way, cannot be a bar to an action by him for obstructing such right of way. *Wright vs. Freeman*, (*On Appeal*) 5 *Harr. & Johns. Rep.* 468.

In the case of *Davis' Lessee vs. Davis' Heirs*, (2 *Harr. & Johns. Rep.* 295, 299.) where the question was whether a person under whom the plaintiff claimed title, died seised of the land for which the ejectment was brought; CHASE, CH. J. said; "The facts and circumstances disclosed in evidence are not sufficient for the jury to presume a title in the heirs of *Parnell*, or a deed to *Parnell*, against the defendant, with sixty years' possession. The entries on the rent roll should show a correspondent title. The strongest presumption in this case of a good title, is in favour of the defendant.

"The court are of opinion, that the facts stated by the plaintiff, although the jury should find them to be true, are not sufficient and legal evidence to warrant the jury in finding that *Daniel Payne* and *Mary Payne* were seized of the lands, and died seized thereof, in opposition to the facts stated by the defendant, if the jury should find them to be true."

"The mere possession of Land without any claim of right gives no title, however long it may continue; and the true owner may lawfully enter upon such occupier at any distance of time, because he does no wrong to the occupant, who claims no right. It is the claim of title that makes the possession of the holder of the land adverse to all others." *La Frombois vs. Jackson ex dem Smith & AL*, 8 *Cow. Rep.* 603. (*Per JONES, CH.*)

Adverse possession cannot be sustained against the *State*, unless the state has expressly restricted its own rights by Statute.

In the case of *Hall vs. Gitting's Lessee* (2 *Harr. & Johns. Rep.* 112, 114.) CHASE, CH. J. (*with whom the other Judges, DUVAL & DONE concurred*) said; "The court are of opinion, that there

"is no adversary possession on the part of the defendant which can defeat the right derived from the state. Under the act of October, 1780, *ch.* 49, the state became actually possessed of the land; and that act dispenses with the requisites necessary in the case of the crown to avoid a possession adversary to the right of the crown, *to wit*, an office found, or an actual entry. By an office found in *England*, the crown becomes actually seized and possessed of any escheat land in question. The state then had the right to pass the act of assembly; and by that act, the state by its commissioners, was in as full possession of the land as if there had been an office found, or actual entry by the commissioners, and ouster of the defendant, or those under whom he claims."

*Et Vide Ante*, page 18, note [2.]

In the case of *La Frombois vs. Jackson ex dem. Smith & Al.*, (8 *Cow. Rep.* 602, 603.) JONES, Ch., said; "If the title was in the people at the time, the possession of *La Frombois*, the purchaser, under the assumed ownership of *Mackay*, would not operate as a bar, unless after an actual possession of forty years; but as against all individual owners, twenty years would preclude the remedy by ejectment. An adverse possession will not obstruct the operation of a patent; and an occupier of land under an invalid claim of title, must have a continued possession of forty years to bar the people or the grantee from the recovery of the same by suit. But where an entry has been made on land vested in the people, by a private citizen claiming it as his own, and he is suffered to hold the premises for the space of forty years, the person so entering and so holding, will acquire the right freely to hold and enjoy the same against the people and their grantees. If, then, the people, after such entry by a citizen, grant the land within the forty years by letters patent to another, the title of their grantee will prevail against the adverse possession of the occupier, if he asserts his right and evicts the intruder within the time allowed by law for his entry. But the grantee of the people in common with all other individuals, must perfect this title by entry upon the settler, within twenty years after his title accrues under the patent, or his entry will be barred, and his remedy by ejectment lost."

In the case of *Stewart & Al. Lessee vs. Mason*, (3 *Harr. & Johns. Rep.* 507, 531.) THE COURT, *per* CHASE, Ch. J. said; "Until there is a grant for the land there can be no rightful possession against the proprietary, so as to bar him by Limitations."

An adverse possession will not invalidate a *devise* by the true owner, while out of possession of the lands so held adversely.

An adverse possession of lands, will not prevent the true owner though out of possession, from devising them. *Waring vs. Jackson ex dem. Eden & Al.*, 1 *Peter's Rep.* (Sup. Ct. U. S.) 570. *May's Heirs vs. Slaughter*, 3 *Marsh. Rep.* (Ky.) 505. 508.

A right of entry in land, is devisable, within the Statute of Wills, (1 R. L. 52.) though at the time of the devise, and of the deviser's death, the land be in the adverse possession of another. *Jackson ex dem. Eden & Al. vs. Varick & Al.*, 7 *Cowen's Rep.* 238. *Affirmed unanimously, Varick & Al. vs. Jackson ex dem. Eden & Al.*, (IN ERROR,) 2 *Wend. Rep.* 166.

In the case last cited, [*Varick & Al. vs. Jackson, &c.*] WALWORTH, Ch. who delivered the unanimous Opinion of the Court, said; "There is no case in the English books, where it has been holden that a mere adverse possession, not amounting to a disseisin, is sufficient to prevent the owner from devising. And in *Goodright v. Forester*, (1 *Taunton*, 604. 613,) Mansfield, C. J. doubts whether even a technical disseisin has that effect at the present day. So far as there is any authority on the subject in our own reports, it is in favor of the right to devise, notwithstanding a mere adverse possession, (*Jackson v. Rodgers*, 1 *Johns. C.* 33;) and such I believe has been the general understanding of the profession in this state. The common opinion as to the effect of a technical or actual disseisin has probably been different.

"The statute against champerty has no application to this subject. That is only in affirmance of the common law. It superadds penalties, but does not alter the legal effect of the sale of a pretended title. The penalties inflicted by that statute are not applicable to the case of a deviser or devisee. Admitting the will to be in the nature of a conveyance, it could only take effect upon the death of the testator, when it would be too late to enforce the penalty against him; and it would be a singular proceeding to attempt to punish the devisee for the act of a deviser. He may refuse to take a conveyance, but I am not aware that he can prevent the operation of an absolute devise, any more than an heir at law can prevent a descent. Besides, such a construction of the statute might frequently cast the property, by descent, upon the person who was wrongfully withholding the possession from the true owner.

"It has frequently been decided that judicial sales and assignments under the insolvent acts, or proceedings in bankruptcy, are not within the operation of that statute; and I can see no reasons why it should be applied to a devise, which are not equally applicable to such sales and assignments. There can be no danger that a man will devise his estate with a view to litigation, which cannot take place till after his death. It is much

"more reasonable to suppose he would confess a judgment, and  
 "suffer the estate to be sold on execution for that purpose."

And, *it seems*, that even a *disseisin*, will not prevent a devise  
 by the *disseisee*, from passing his right and interest in the lands of  
 which he is *disseised*.

In the case last cited, (2 *Wend. Rep.* .202,) WALWORTH, Ch.  
 said; "Whether, under the British statutes since the abolition of  
 "military tenures, there is any *disseisin* which will deprive the  
 "owner of property of the power of devising the same, is a ques-  
 "tion which does not arise under the facts of this case. The  
 "statute 34 and 35 Hen. 8, (c. 5, sec. 4,) authorizes any person  
 "having a sole estate or interest in fee simple of and in any ma-  
 "nors, lands, tenements, rents or other hereditaments in posses-  
 "sion, reversion or remainder, to devise the same. And in *Good-*  
 "*right v. Forester*, (8 *East's Rep.* 567,) Lord Ellenborough ap-  
 "pears to have put some stress on the words in *possession, rever-*  
 "*sion or remainder*, as words of restriction or limitation. Where  
 "the true owner is absolutely divested of his estate, and the same  
 "is vested in the disseisor by a *disseisin* in fact, according to the  
 "ancient doctrines of the feudal law, especially if the right of en-  
 "try is taken away so as to reduce the owner's claim to a *mere*  
 "*right*, it may not be correct to call it an *estate or interest in pos-*  
 "*session*, in the words of the British statute, although it is still an  
 "hereditament and descendible. Our statute of wills provides,  
 "that any person having any estate of inheritance either in sev-  
 "erality, in coparcenary, or in common, in any lands, tenements  
 "or hereditaments, may, at his own free will and pleasure, give  
 "or devise the same, &c. [*Sess.* 36, ch. 23. sec. 1.] It is hard-  
 "ly possible, in broader and more explicit terms, to give a gener-  
 "al power to dispose of any property, right or interest in real es-  
 "tate by will, whether the same is a vested freehold in possession  
 "of the testator or a mere descendible hereditament or interest  
 "therein, in respect to which, he had only a right of entry, or a  
 "mere right of action. But as the legislature, in the late revi-  
 "sion, have settled the rule of property as to all future devises,  
 "and being satisfied there was no actual *disseisin* of the estate of  
 "Medcalf Eden the younger proved on the trial, I think it is un-  
 "necessary for me to express any opinion as to the power of a  
 "disseisee to devise, either under the British statute of wills or  
 "our own."

And although it be a *disseisin* in fact, as distinguished from a  
*disseisin* by election, yet it *seems* that the devise by the *disseisee*  
 will be equally effectual.

In the opinion of WALWORTH, Ch, in the same case last cited,  
 (2 *Wend. Rep.* 201, 202, 203, 204,) it is said; "But the princi-

"pal question in this cause is as to the validity of the devise of Medcef Eden the younger. Two kinds of disseisin are mentioned in the English law books. The one was a disseisin in fact, which actually changed and divested the seisin of the original owner of the freehold, and deprived him of all right in relation thereto, except the mere right of entry and of property; and which, under certain circumstances, was still further reduced to a mere right of action, the right of entry being lost.

"By this species of disseisin the wrong doer acquired a fee simple, and the actual seisin of the property, together with nearly all the rights of the real owner; and all estates depending on the original seisin were divested or displaced. The other kind of disseisin was called disseisin by election, because the owner might elect to consider himself disseised for the sake of the remedy by action of *novel disseisin*; but if he did not elect to consider himself disseised, the freehold was not divested, but still continued in him. (*Blenden v. Baugh*, *Cro. Car.* 302.)

"Disseisin in fact and disseisin by election have been so frequently confounded, that, in examining the *dicta* of judges, it is sometimes difficult to understand to which species of disseisin they allude, without referring particularly to the facts of the case which they had under consideration at the time such *dicta* were delivered. But, by a careful examination of the authorities, it will be found that there could be no disseisin in fact, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which was tantamount; such as a common law conveyance, with livery of seisin, by a person actually seized of an estate of freehold in the premises; or some one lawfully in possession representing the freeholder, (1 *Instit.* 330, *C. note* 1;) or by a common recovery, in which there was a judgment for the freehold, and an actual delivery of seisin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record. (2 *Bl. Com.* 348. *Co. Litt.* 330, *C. note* 1. *Doe v. Thompson*, 5 *Cowen's Rep.* 371. *Smith v. Burtis*, 6 *Johns. Rep.* 197.)

"In this case there was no expulsion of the tenant of the freehold; and Medcef Eden the younger did no act which could possibly be construed into an election to consider himself disseised. When Boyd took possession of the premises in 1805, it was during the life of Joseph Eden, and of course before the happening of the contingency which afterwards divested the estate acquired under the conveyances of the first of September, 1804, and the first of May, 1805. By those conveyances Boyd acquired all the right of Joseph Eden, which was an estate in fee, subject, however, to be defeated by the death of Joseph without issue, during the life-time of Medcef. His entry, therefore, was congeable, and divested no estate. None of the conveyances executed during the life of Joseph Eden were common law con-



"veyances, with livery of seisin, and of course divested no rights but those of the grantors. By the death of Joseph Eden in 1813, the title vested in Medcef; and the holding over of the person in possession, after the termination of his estate in the premises, could not be a disseisin of the rightful owner. After that time, the rights of the parties were not altered previous to the death of Medcef Eden. There was then nothing to prevent the operation of his will, unless the bare holding over of a tenant for life, after the determination of his estate, and claiming the fee, can have that effect."

It is thus decided,

1st. That "there can be no disseisin in fact, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some act tantamount thereto; such as a common law conveyance, with livery of seisin, by a person actually seized of an estate of freehold in the premises, or some one, lawfully in possession, representing the freeholder, or by a common recovery, in which there is a judgment for the freehold, and an actual delivery of seisin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record."

2d. That "the holding over of a tenant for life, after the determination of his estate, though he claims the fee, is not a disseisin of the rightful owner."

3d. That "conveyances, which are not common law conveyances, accompanied with livery of seisin, divest no rights but those of the grantors."

And as to what amounts to a *Disseisin*, vide also, *ante* page 20, notes [1] & [2]; and page 21, note [1].

Nor will an *adverse possession*, or a *disseisin*, prevent the right and interest of the true owner, if a debtor, from passing by judicial sales; or in the case of an insolvent, by assignment; or, as a bankrupt, by legal proceedings pursued in such cases.

"It has frequently been decided that judicial sales and assignments under the insolvent acts, or proceedings in bankruptcy, are not within the operation of that Statute." [*Act to prevent and punish Champerty and Maintenance*, 1 R. L. 172.] *Varick & Al. vs. Jackson ex dem. Eden & Al.*, (*In Error*), 2 Wend. Rep. 204. (*Per* WALWORTH, CH.)

An *adverse possession* cannot avail the occupant, where the true

owner is under any of the disabilities which are protected by the Statutes of Limitations.

*Vide, ante, Chapter 3; and the notes thereto.*

And, an adverse possession commenced during the existence of a particular estate, cannot prejudice the right of the person entitled in reversion or remainder, until after the termination of such particular estate.

*Vide ante, page 37, note [1.] and page, 41 note [1.]*

Whether, or not, a possession is adverse, is to be determined by the Jury, and not by the Court.

The question of adverse possession ought to be left to the jury. *Jackson ex dem. Jadwin vs. Joy*, 9 Johns. Rep. 102. *Jackson ex dem. Beekman vs. Stephens*, 13 Johns. Rep. 496. *Gayetty vs. Bethune*, 14 Mass. Rep. 55. *Jackson ex dem. Sparkman vs. Porter*, 1 Paine's Rep. 466. *M'Clung vs. Ross*, 5 Wheat. Rep. 124. *Cummings vs. Wyman*, 10 Mass. Rep. 468.

Whether a possession were or were not adverse is a question of fact, and must be determined by the jury. *Atherton vs. Johnson*, 1 New Hamp. Rep. (R. & W.) 34.

And the judge having directed the jury as to that fact, a new trial was granted. *Jackson ex dem. Jadwin vs. Joy*, 9 Johns. Rep. 102. & *Vide Runcorn vs. Doe ex dem. Cooper*, (In Error,) 5 Barnew. & Cress. Rep. 696.

In the case of *Pray vs. Pierce*, (7 Mass. Rep. 383.) THE COURT HELD, That a trespass on the land of another will not amount to an ouster without a knowledge thereof by he owner, either express or implied; and they said; "But whatever may be the evidence of this notice, it is a fact to be found by the jury, and the court cannot presume it."

"The court were also of opinion, that with what intention, by what right, a person entered into land and possessed it, and to what extent, were facts proper for the consideration and determination of the jury. *Helm's Lessee vs. Howard*, 2 Har. & M'Hen. Rep. 76."

In the case of *Seymour vs. De Lancey & AL*, (1 Hopk. Rep. 449.) SANFORD, Chancellor, said; "If William Seymour acquired a title by adverse possession, such a title would preclude all other inquiries; and the inquiry whether his possession was adverse or not, and the length of such a possession, are questions of fact. The inquiry whether the deed from Henry E. Lutterloh, is genuine or not, is purely a question of fact. These

"questions are peculiarly proper for the trial by jury as the best method of ascertaining their truth."

If a plea of prescription be received at the trial, the party pleading it must be permitted to submit the fact of his possession to the jury. *Porter vs. Bugat*, 9 *Martin's Rep.* 92.

And the question of *Disseisin*, is to be left to the decision of the jury.

In the case of *Jackson ex dem. Van Alen vs. Rogers*, (1 *Johns. Cas.* 49.) LEWIS, J. said, "The reference of *Holland's* interest to the jury was right upon every principle. Whether he was or was not a disseisor, is not, as has been mistakenly supposed, a question of law, but of fact. *Disseisin*, says Lord Mansfield, in the case last cited, (*Taylor ex dem. Atkins vs. Horde*,) is a fact to be found by a Jury."



The Statute of Limitations does not, in terms, apply to chancery cases, but the Chancery Courts will never interfere when by lapse of time the Law Judge would not hold jurisdiction. *Frame vs. Kenny's heirs & Exors.*, 2 *Marsh. Rep. (Ky.)* 145. *Elmendorf vs. Taylor & Al.*, 10 *Wheat. Rep.* 152. *Marquis of Cholmondeley vs. Lord Clinton*, 2 *Jac. & Walk. Rep.* 192. & *Vide Wallace & Al. vs. Duffield & Uz.*, 2 *Serg. & R. Rep.* 521. *McDowell vs. Heath's Exors.*, 3 *Marsh. Rep. (Ky.)* 223. *Hamilton, Ex'x. vs. Shepperd, Admr. & c.*, 3 *Murph. Rep.* 115. *Van Rhyn vs. Vincent's Exors.*, 1 *McCord's Ch. Rep.* 314.

Twenty years' adverse possession under a legal title is a bar to a bill in Equity, as well as to an Ejectment. *Hinton vs. Fox*, 3 *Littell's Rep.* 382. & *Vide Demarest & Uz. vs. Wynkoop & Al.*, 3 *Johns. Ch. Rep.* 129. *Reed & Glen vs. Bulloch & Al.*, *Littell's selected cases*, 512. *Shepherd's heirs vs. Young*, 1 *Monr. Rep.* 205. & *Vide references ut supra.*

It must be 20 years' adverse possession of the land in contest. *Spurr & Al. vs. Trimble & Al.*, 1 *Marsh. Rep. (Ky.)* 281.

A mortgagor cannot redeem after a lapse of twenty years, after forfeiture and possession by the mortgagee, (which period has been adopted in Equity by analogy to the Statute of Limitations,) no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. *Hughes & Al. vs. Edwards & Uz.*, 9 *Wheat. Rep.* 489.

Fifteen years' possession, where no statute disabilities, or special

circumstances equivalent thereto exist, will bar an equity of redemption. *Skinner vs. Smith*, 1 *Day's Rep.* 124.

Satisfaction of a mortgage is to be presumed after 20 years' possession by the mortgagor, without payment of interest, demand or acknowledgment. *Christophers vs. Sparke*, 2 *Jac. & Walk. Rep.* 223.

"A lapse of less than twenty years from the accrual of the right of suit, is no bar to the assertion of an equitable right in a Court of Chancery, as it would not be to the assertion of a legal right in a Court of Law." *Fraily vs. Langford & Al.*, 1 *Marsh. Rep. (Ky.)* 364.

Twenty years at least are required to bar the equity of redemption in cases of mortgages of a legal or equitable interest in real estate. *Slee vs. The Manhattan Company*, 1 *Paige's Ch. Rep.* 80.

"We do not suppose that the Statute of Limitations in terms applies to the case, but it is no less obligatory upon a Court of Equity than upon a Court of Law, and it is considered as the rule of decision in relation as well to equitable as legal rights. In reference to the latter, a Court of Equity decides in obedience to the Statute, and in reference to the former, it conforms to the Statute by acting upon its principles, according to the rule "equitas sequitur legem." (Per BOYLE, CH. J., delivering the Opinion of the Court,) *Lytle & Al. vs. Rowton*, 1 *Marsh. Rep. (Ky.)* 519.

## NOTE (B.)

The following are decisions either upon local or special Acts of Limitations of the several states, as distinguished from the general Acts of Limitations; or upon some peculiar provisions of their general Acts of Limitations.

## CONNECTICUT.

Twelve months in the Statute of Limitations are Calendar months. *Clark vs. Ely*, 2 Root's Rep. 380.

An agreement not reduced to writing is barred by the Statute of Limitations after three years, unless there has been an admission of it by the defendant within that time. *Barnes vs. Taintor's Admr.* 4 Conn. Rep. 568.

The Statute of Limitations regarding book debts, as it existed before the revision in 1821, as well as since, is applicable, not to the form of action merely, but to the nature of the indebtedness. Therefore where an action of *assumpsit* was brought in 1822, for services ordinarily charged on book, rendered in 1811, it was held, that the plaintiff was barred of a recovery. *Robbins vs. Harvey*, 5 Conn. Rep. 335. *Ashley vs. Hill*, 6 Conn. Rep. 248.

But in an action of *Assumpsit*, where the declaration contained a count upon an *insimul computassent*, and the defendant pleaded the Statute of Limitations. DAGGETT, J. *delivering the Opinion of the Court*, said; "The count upon an *insimul computassent* is the only one, which requires examination. The single question presented for consideration, is, does the Statute which limits a recovery, in the action of debt by book to six years, create a bar to this count? *Assumpsit* upon an *insimul computassent*, is an action at common law, long established and well known. When parties account together concerning their mutual transactions, debts, credits and liabilities, and a balance is ascertained, their accounts assume, to some purposes at least, a new shape. The creditor becomes entitled to recover the balance due to him in an action founded on the fact, that it is acknowledged by the debtor on an adjustment of their respective claims."—"The Statute in force before the revision of 1821, in the terms of it did not extend to actions on *insimul computassent*; nor do I believe, that it ought to be extended, by construction; especially as by a subsequent enactment now in force, (*Stat.* 310. tit. 59. s. 3.) this action of *Assumpsit* is lim-

"ted to six years."—"I am of opinion that the plea is insufficient; and that judgment be rendered accordingly." *Ashley vs. Hill*, 6 Conn. Rep. 246, 248.

A. conveyed a piece of land to B. by an absolute deed, as security for a debt; B. at the same time executed a bond to A., obligating himself to reconvey the land when the debt should be paid. Afterwards it was agreed between them by parol, that A. should deliver up the bond to B. for the purpose of enabling him to assist A. in effecting a settlement with a certain creditor, and that B. should redeliver the bond to A. uncanceled, when the object should be effected. The settlement with the creditor being effected, and the debt due from A. to B. being paid, B. refused to redeliver the bond, and cancelled it. *Held*, that such parol agreement was within the provisions of the Statute against fraudulent conveyances. *Held, also*, that more than three years having elapsed between the time of making such agreement, and the commencement of the suit, the cause of action was barred by the Statute of Limitations. *Gaylord & Al. vs. Couch. (In Error,)* 5 Day's Rep. 223.

The Statute of Limitations of New-York cannot be pleaded in bar to a suit brought in Connecticut, on a promissory note executed in New-York, the year previous to the passing of the Statute; the defendant was a resident of Connecticut. *THE COURT* said; "The note is not within the Statute, but if it was within the letter, the Statute would not affect it, being an ex post facto law." *Hill vs. Minor*, 2 Root's Rep. 223.

In an action for support of a bastard child, judgment being rendered for quarterly payments, the Statute of Limitations does not operate in favour of the bail 'till a year after the last payment. *Harris & Uz. vs. Thomas; Kirb. Rep.* 267.

In the case of *Fanning & Al. vs. Coit*, (*Kirb. Rep.* 423,) where a claim of debt against the estate of a deceased person, had not been exhibited to the administrator within the time limited by the Court of Probate, *THE COURT* said; "The petitioner neglecting to exhibit his claim to the administrators within the time limited by the Court of Probate, was by a positive Statute, foreclosed from any recovery afterwards; which no court of law or equity hath right to dispense with, or relieve against."

The 17th section of the Statute [of Connecticut,] tit. 158. c. 1. Ed. 1808, which prohibits the bringing of suits for drink sold by tavern keepers, "unless the same be brought within two days after such sale and drinking;" is not to be regarded as a mere Act of Limitation having for its object the protection of men

against stale demands, and operating upon the remedy only, without destroying the debt, but as an act of prohibition, qualified with respect to time, but otherwise absolute. Consequently, after the expiration of the time limited without suit, charges embraced by the Statute do not constitute a debt capable of being applied or set-off against the charges of the adverse party, in the liquidation of mutual accounts. Nor is it to be considered, "as an ordinary Statute of Limitations liable to be avoided by a new promise of the defendant." *Maples vs. Avery*, (In Error,) 6 Conn. Rep. 20, 24.

#### GEORGIA.

The Act of Limitations of Georgia does not apply to mortgages. The possession of the mortgagor is not adverse. *Higginson vs. Mein*, 4 Cranch's Rep. 415.

#### KENTUCKY.

The Act of Limitations applies to suits brought by petition and summons. *Banks vs. Coyle*, 2 Marsh. Rep. (Ky.) 564.

The 5th section of an act passed February 9th, 1819, 1 Dig. Laws of Kentucky, 537, limiting the time of bringing suits against executors and administrators, is confined to actions on contracts made by the decedent. Contracts made by executors or administrators, although in fulfilment of an executory contract made by the decedent, are not within the act. *Cummins vs. Kennedy*, 3 Litt. Rep. 121.

#### LOUISIANA.

Prescription for three years bars an attorney's action for professional services. *Morse vs. Brandt*, 2 Mart. Rep. (N. S.) 515.

#### MARYLAND.

*B. Harwood* filed a bill in chancery in 1805 against the heirs at law of *R. Rawlings*, on a bond executed by *R. Rawlings* in 1789; it was admitted that the personal estate of *R. Rawlings* was insufficient to pay the complainant's demand. The heirs by their answer relied on the Act of Limitations; and to prevent the operation of that Act, the complainant exhibited a judgment obtained by him in 1802, on the administration bond executed by the administratrix of *R. Rawlings*. *KILTY, Chancellor*, (at February term, 1813,) said; "The defence set up of the claim being barred by the Act of Limitations, is one which the chancellor would not be disposed to countenance, if he had a discretionary power. But as it is relied on, he considers himself bound to say, that it is a bar to the relief prayed."—Decreed, that the bill be dismissed, but without costs. The complainant appealed from this de-

crees; but the Court of Appeals affirmed it. *Harwood vs. Rawlings' heirs*, 4 Harr. & Johns. Rep. 126.

By an order of the orphan's court in August, 1797, the executrix of C. S. was directed to deliver to S. W., one of her sureties in the testamentary bond, all such part of the estate of the testator as remained in her hands. S. W. entered into bond to the state, dated in September, 1797, reciting the order, and conditioned that he should deliver and pay all the goods, &c. which should come to his possession by virtue or under the order, or the value thereof, agreeably to law, "to such person or persons as have a right to demand the same, when he shall be thereto legally required," &c. An action of debt was brought on this bond in September, 1811, at the instance of one of the creditors of the deceased testator, against one of the sureties therein, who pleaded general performance, and the Acts of Limitations of 1729, ch. 24, and 1715, ch. 23. Held, that a creditor was not entitled to have the bond sued; as S. W. could not pay the debts of the deceased, nor recover debts, nor pay legacies, nor settle an account in the orphan's court. That he may be likened to one who has letters *ad colligendum*. That he was liable to the administrator *de bonis non*, (the executrix being dead,) if one was appointed; and if none appointed, to nobody.

Held also, that the bond above mentioned executed by S. W., on which the action was brought, was the thing in action, and not the judgment mentioned in the replication obtained by the creditor against the executrix of C. S. in 1803; and that the Act of Limitations was a bar to the action. *The State, use of Chamberlaine's Ex'rs. vs. Wright*, 4 Har. & Johns. Rep. 148.

A plea of the Act of Limitations is a bar to an action on a bond given to the state, by a trustee appointed under a decree of the court of chancery for the sale of the real estate of a deceased person, &c. where the bond was executed more than twelve years before the institution of the action. As where A. Q. was appointed a trustee, under a decree of the court of chancery, to sell the real estate of J. S., deceased, and gave bond as such to the state, with J. M. and C. S. his sureties, on the 20th of December, 1795, and the action was brought on the bond against C. S., one of the sureties, on the 4th of May, 1809, who pleaded the Act of Limitations, to which there was a general demurrer. The demurrer was overruled. *Schell vs. The State, use of Sawyer*, 3 Harr. & Johns. Rep. 538.

Under an act of the Legislature incorporating a company, shares were to be subscribed for to be paid in five instalments; four of the instalments had become due more than three years before the



suit was brought against the defendant, who was a subscriber, and who pleaded the Statute of Limitations. The last instalment of \$20 was not barred. *Held*, that although the last instalment of \$20 was not barred by the Statute of Limitations, yet as the county court had not jurisdiction of that sum, that court did not err in their direction to the jury, that the plaintiffs were barred of their right of action by the defendant's plea of the Act of Limitations. *The Baltimore & Havre de Grace Turnpike Company vs. Barnes*, 6 Harr. & Johns. Rep. 57.

#### MASSACHUSETTS.

Land under a prior attachment to its full value, is property that may by the common and ordinary process of law be attached, within the meaning of the Statute of Limitations. So, of shares in a Bank or Insurance Company. *Byrne vs. Crowninshield*, 1 Picker. Rep. 263.

The name of a person subscribed to a promissory note, with intent to attest the signing thereof by the maker, is a sufficient witnessing within the Statute of Limitations; although there are no words over the name indicating the intent of his subscription. *Faulkner vs. Jones*, 16 Mass. Rep. 290

The endorsee of a promissory note, cannot avail himself of the notes' being witnessed, to take it out of the Statute of Limitations. *Russell, Ex'x. vs. Swan*, 16 Mass. Rep. 314.

"In order to expedite the settlement of estates, as well as to relieve executors and administrators from vexation and uncertainty, the term of four years is limited, within which all creditors whose debts are due and payable, must present their claims or be forever barred." *Royce vs. Burrell & Al.*, 12 Mass. Rep. 398. (Per PARSONS, Ch. J. delivering the Opinion of the Court.)

Suits by one town against another, for expenses incurred in the support of paupers, are limited to two years after the cause of action accrued. *Needham vs. Newton*, 12 Mass. Rep. 453.

The Statute of Limitations of the State of New York, cannot be pleaded in bar to an action commenced in Massachusetts by inhabitants of New York, upon a promissory note executed in New York by the Defendants, citizens of Massachusetts. *Pearshall & Al. vs. Dwight & Al.*, 2 Mass. Rep. 84.

Nor where both parties are citizens of New York. *Byrne vs. Crowninshield*, 17 Mass. Rep. 55.

Within six years after the dissolution of a partnership, one of the partners died, and within two years after the grant of Letters

of Administration on his estate, but more than six years after the partnership was dissolved, his administrators brought a Bill in Equity against the other partners, to compel them to account. PARKER, Ch. J. *who delivered the Opinion of the Court*, said; "The Plea of the Statute of Limitations cannot avail, because until the dissolution of partnership, there was no subsisting cause of action for the settlement of accounts between the partners. Clark Chandler died in 1824, within six years after the dissolution, and the Bill was brought by his Administrators within two years after his death, so that by St. 1793, c. 75, the right of action remained." *Chandler & Al., vs. Chandler & Al., 4 Picker. Rep. 81.*

Where an administrator dies within four years from the grant of administration, and an administrator *de bonis non*, is appointed, actions of creditors are not barred until after the expiration of four years from this last grant of administration. *Hemenway vs. Gates, Administrator, &c. 5 Picker. Rep. 321.*

Two persons having been appointed guardians of a spendthrift, sold his real estate by virtue of a licence granted by the Court of Common Pleas, and credited him in their guardianship accounts with the proceeds, which they applied to the payment of his debts, some of the debts being paid by one guardian and some by the other. The letters of guardianship were afterwards revoked, and the spendthrift and his heirs avoided the sales of the real estate, the licence having been granted without any authority, and thereupon the guardians were compelled, upon their covenants, to refund the money paid by the purchasers. It was *Held*, that the guardians had a right of action against the spendthrift's administratrix for the amount refunded, so much having been originally paid by them for the spendthrift upon a consideration which had failed; that this right did not accrue until the sales were avoided and the money refunded, so that the Statute of Limitations began to run from that time. *Shearman & Al. vs. Akins, Admx. 4 Pick. Rep. 283.*

Notwithstanding the proviso in St. 1793, c. 59, §9, an action will lie against a town after two years, upon a verbal promise of the overseers to pay the expenses incurred in supporting a pauper legally chargeable to such town; such a promise being barred only by the general Statute of Limitations. *The Inhabitants of Bel-just vs. The Inhabitants of Leominster, 1 Picker. Rep. 123.*

#### NEW JERSEY.

The 6th Section of the "Act for the limitation of Actions," passed 7th February, 1799, (*New Jersey Rev. Laws*, 411,) which limits the commencement of suits on specialties to .16 years, ap-

plies not only to bonds executed after, but also to those executed before the passage of that act. *Marston vs. Seabury*, 2 Penn. Rep. 435.

Where an Executor pays money to a legatee, and six years after the payment, upon a settlement in the Orphan's Court, discovers that he has paid the legatee more than he was entitled to, and brings an action to recover the money overpaid; the action is barred by the Statute of Limitations. *Ely vs. Norton, Exor. (On Certiorari)*, 1 Halst. Rep. 187.

#### NEW YORK.

The act to settle disputes concerning titles to lands in the county of Onondaga, (Sess. 20. c. 51.) is a constitutional act. *Jackson ex dem. Lepper vs. Griswold*, 5 Johns. Rep. 539.

The award of the commissioners, under the act is considered as a matter of record to take effect from its date; and unless a dissent has been entered within two years from the date of the award it is conclusive. *Ibid.*

The date of the award is *prima facie* evidence of the time of its being made; and strong evidence will be required to show that the date on the face of the award is not the true time. *Ibid.*

The act applies only to interfering and adverse claims. *Jackson ex dem. Fonda vs. Teale*, 7 Johns. Rep. 28.

An award in favour of the grantor in a deed, will enure in favour of the grantee, it being in favour of the title; and the grantee, there being no dispute between him and the grantor, need not dissent. *Jackson ex dem. Fonda vs. Teale*, 7 Johns. Rep. 28.

None but persons aggrieved need file a dissent. *Ibid.*

Infants, and others, under legal disabilities at the time of the award must file their dissent within three years after coming of age, or the removal of the disability, otherwise they will be barred. *Jackson ex dem. Cornelius vs. McKee*, 8 Johns. Rep. 429. *S. P. Jackson ex dem. Boyd vs. Lewis*, 13 Johns. Rep. 504.

The limitation in the act, as to the time of filing a dissent, cannot be set up against such of the lessors in ejectment, as were *feme covert*s at the time the award was made; and bringing the action during the coverture is no waiver of the saving clause in the statute. *Jackson ex dem. Bunt vs. Ransom*, 10 Johns. Rep. 407.

But the filing a dissent being, by the act, a condition precedent to a right of recovery, an action cannot be maintained before a

dissent has been filed ; but the wife, by herself, or by her husband, in her name, may file a dissent, and bring her action with her husband, and recover during coverture ; or she may, within three years after the death of her husband file her dissent, and bring an action. *Ibid.*

Where the heirs of *N.*, a native of *Ireland*, and living in *Ireland*, neglected to enter their dissent to the award of the *Onondaga Commissioners*, in relation to a lot of land of which *N.* died seized, within the two years limited by the act, they were held for ever barred and concluded by the award, except *L.*, who was a *feme covert*, and within the saving of the act, there being no saving on account of absence from the state. *Jackson ex dem. Folliard vs. Wright*, 4 *Johns. Rep.* 75.

If a party, conceiving himself aggrieved by an award of the *Onondaga Commissioners*, has given them notice of his dissent, within two years, that is sufficient to prevent his being concluded by the award, whether the commissioners have entered such dissent in their book of awards or not ; and whether the dissent was delivered to the commissioners or not, is a question for the jury. *Jackson ex dem. Reiley vs. Livingston*, 3 *Johns. Rep.* 455.

But as to filing his dissent, he must give notice to the commissioners to commence a suit within three years, &c. according to the third section of the act. *Jackson ex dem. Boyd vs. Lewis*, 13 *Johns. Rep.* 504.

It is not sufficient to bring an action within the three years, without having filed a dissent. *Jackson ex dem. Cornelius vs. M'Kee*, 8 *Johns. Rep.* 429.

Whether the land was vacant or not, the dissent is equally necessary. *Ibid.* *S. P. Jackson ex dem. Robicheau vs. Swartwout*, 8 *Johns. Rep.* 490.

Where no dissent is filed, the title, under the award of the commissioners, is final and conclusive. *Jackson ex dem. Robicheau vs. Swartwout*, 8 *Johns. Rep.* 490.

Where two successive conveyances of military lots were made by the patentee before the statute of *January 8th*, 1794, (1 *R. L.* 209,) neither of which were deposited in the clerk's office of *Albany*, pursuant to that act ; held, that the deed last executed took preference. Held, also, that a conveyance by the patentee, for a valuable consideration, subsequent to the second, should take preference of that ; but it appearing that it was executed pending an ejectment by those claiming under the second conveyance,

to a grantee who had notice of that conveyance, and actual knowledge of the first; *held*, that it lay with the defendant to show otherwise than by the last conveyance, that a valuable consideration was, in fact, paid. *Jackson v. Harrington*, 6 *Cow. Rep.* 135.

Whether a subsequent conveyance for valuable consideration, with notice of a prior deed, comes within the protection of the statute, (1 *R. L.* 209,) or it must be *bona fide* in the full sense of the terms? *Quere. Ibid.*

To render the conveyance of a military lot, executed before *January 8th*, 1794, valid as against a subsequent purchaser; not only the immediate deed must have been deposited, pursuant to the act of 1794, (1 *R. L.* 209, 211,) but also the power of attorney under which it was executed. *Jackson v. Bowen*, 6 *Cow. Rep.* 141.

An award of the *Onondaga Commissioners*, was made in favour of the defendant, *November 5th*, 1800, to which the plaintiff filed a *dissent*, according to the act, in *February*, 1801, and it appeared that the defendant was in actual possession in *June*, 1801: *held*, that though the possession commenced after the award and dissent, but before the expiration of three years; yet the party filing the dissent was bound to take notice of the possession, and to bring his action against the party in possession within the three years, and prosecute the same to effect within three years; otherwise, the award was conclusive. *Jackson ex dem. Bond vs. Root*, 8 *Johns. Rep.* 60.

If the party in whose favour the award was made, is out of possession, and his adversary in possession, the party out of possession must bring his action and prosecute it to effect within three years; and if he does so, his title is established, and the recovery is conclusive on the right. *Ibid.*

And it is the same, if the party dissenting brings a suit against a tenant in possession claiming under the party in whose favour the award was made, if a verdict, after trial as to the right is found for the defendant; for the intention of the legislature in regard to these military lands was to make a single trial as to the right, in an action of ejectment brought within the time limited, a conclusive bar to another suit; and if there is a trial on the merits, in a suit brought by either party, within the period prescribed, it is within the true meaning and intent of the act. *Ibid.*

A. having title to a lot of land in the county of *Onondaga*, directed B. to take charge of the lot, and sell it, and B. went on the lot occasionally to show it. C. also claimed the lot, and the claims of the parties were litigated before the commissioners, who, on the 20th *January*, 1802, made an award in favour of C.; and, in *July*, 1802, about half an acre of the lot was cleared and fenced by the order of A., and logs cut and laid as the foundation

for a house, which was not, however, built or occupied. In March, 1802, A. filed his dissent to the award, and brought an action in 1807; *Held*, that the acts of A. did not constitute an actual possession of the lot within the meaning of the act, so as to oblige C. to bring his action within three years; and that the land being vacant, A. was not bound to bring his action within the three years, the act not extending to the case of a vacant possession; and that, therefore, neither party being barred, they must stand on the strength of their respective titles. *Jackson ex dem. Scott vs. Huntley*, 6 Johns. Rep. 89.

*Dunbar*, an infant, in 1784, conveyed a lot of land in the military tract, to *Macey*, who conveyed the same, in 1794, to *Platt*, who conveyed it to *Thorn*. *Dunbar* came of full age in 1786, and, afterwards, in 1791, without having made any entry on the land, or done any act to avoid the deed to *Macey*, executed another deed, for the same lot, to *Brooks*; and the executors of *Brooks*, afterwards, in 1794, conveyed the same lot to *Isaacs*, who contracted to convey the same to *Cady*, who assigned the contract to *Todd*, who entered into possession in 1795, and afterwards, in 1797, received a deed from *Isaacs*. On the 18th of November, 1802, the *Onondaga Commissioners* awarded the lot to *Thorn*; and *Todd*, in May, 1802, filed his dissent, pursuant to the statute. In an action of ejectment, brought on the demise of *Dunbar*, *Macey*, *Platt*, and *Thorn*, against *Todd*, to recover the lot; *held*, that though the deed from *Dunbar* to *Macey* was voidable, *Todd* could not avail himself of the subsequent deed from *Dunbar* to *Brooks*, to avoid it; and that, though the dissent of *Todd* would enure to the benefit of those from whom he derived his estate, yet as it did not appear that the executors of *Brooks* had any authority to convey, no privity of estate was shown between him and *Todd*; and that as, by the award in favour of *Thorn*, the deed to *Brooks* was rendered inoperative, no dissent having been filed by the heirs of *Brooks*, the award was conclusive against them, and so *Todd* could not avail himself of the deed to *Brooks*, as a subsisting outstanding title; and that though the deed to *Thorn*, on account of the adverse possession of *Todd*, was void; yet the award of the commissioners on the title, and being in favour of *Thorn*, it must extend and enure to the benefit of all those from whom he derived title, and confirmed the deeds to *Macey* and *Platt*, who were not bound to enter any dissent, as the award was in favour of their alienee. *Jackson ex dem. Dunbar vs. Todd*, 6 Johns. Rep. 257.

#### NORTH CAROLINA.

An action of debt on a Promissory Note not under Seal, is not within the Statute of Limitations of North Carolina. *Johnston vs. Green*, 1 Nor. Car. Law Rep. 516.

An action against Executors for money received by their testator in his life time as County Ranger, is limited by the Act of 1715. *Alexander, County Trustee vs. The Executors of Alexander*, 1 Nor. Car. Law Rep. 273.

The limitation of suits against executors or administrators, does not apply to suits against heirs or devisees. *Hollowell vs. The devisees of Pope*, 1 Nor. Car. Law Rep. 222.

#### PENNSYLVANIA.

Suits against sureties in a Constable's official Bond are limited, to seven years from the time at which the cause of action arose; by the Act of 4th April, 1798. *Owen & Al. vs. The Commonwealth*, 8 Serg. & R. Rep. 530.

Act of Limitations applies to a general *Indebitatus Assumpsit*, for monies under a settlement by two administrators in the Orphan's Court. *Gemberling vs. Myers & Al. Admr. &c.* 2 Yeates' Rep. 341.

#### VERMONT.

Where a demand is barred by the existing laws of a foreign country, where the contract was made, it cannot be revived by transferring it to an inhabitant of this State. [Vermont.] *Woodbridge vs. Austin*, 2 Ty. Rep. 364.

A declaration, describing a note without any consideration expressed in the note, but describing a consideration, distinct from the note itself, sets forth a note within the Statute of Limitations. *Leonard vs. Walker*, Brayt. Rep. 203.

The clause in the Statute of Limitations, limiting the time for bringing an action of debt, or *Scire Facias* on judgment to eight years, does not extend to a *Scire Facias* provided by the 9th Section of the Act, directing the serving and levying executions, in a case where an execution has been levied on property, which did not belong to the debtor. *Baxter vs. Tucker*, 1 Chip., Rep. 353.

A note payable in specific or collateral articles, is a promissory note, under the Statute of Limitations, and is not, (if witnessed,) barred, till fourteen years. *Meed vs. Ellis*, Brayt. Rep. 203.

#### VIRGINIA.

In an action brought in Virginia, on a judgment obtained in North Carolina, the Act of Limitations of North Carolina, cannot be pleaded in bar, but the law of the former must prevail; the

Act of Limitations affecting the remedy and not the right. Nor, as it seems, does the Act of Limitations of Virginia apply to such a case. *Jones, Admr. vs. Hook's Admr.*, 2 *Rand. Rep.* 303.

Where the characters of administrator and distributee unite in the same person, who holds possession of personal property, in the former character, for more than five years, his rights as distributee will not be barred by the Statute of Limitations. *Vaiden, &c. vs. Bell*, 3 *Rand. Rep.* 448.



## NOTE (C.)

A summary of the Statutes of Limitations of the respective states of the Union, alphabetically arranged; compiled principally from the Statutes themselves; but in some few instances from Griffith's "Law Register of the United States."

## ALABAMA.

*Actions relating to Lands.*

1. No entry to be made into lands but within 20 years after right or title accrued.

2. Real, possessory, ancestral, mixed or other action for lands, to be commenced within 30 years next after right or title thereto, or cause of action accrued.

*Proviso.* That the time during which the person who has such a right of entry or of action shall have been under 21 years of age, feme covert, or insane, shall not be computed part of the period of Limitation.

*Personal Actions.*

1. Actions of trespass *quare clausum fregit*; Trespass; Detinue; Trover; Replevin for taking of goods and chattles; Actions of debt founded on lending or contract without specialty, or for arrearages of rent, on a parol demise; Actions of account and upon the case (except actions of slander, and such as concern the trade of merchandise between merchants, their factors or agents,) must be commenced within six years next after the causes of action accrue.

2. Actions of trespass for assault, menace, battery, wounding and imprisonment, or any of them, within 2 years next after the cause of action accrues.

3. Actions on the case for words, within one year next after the words spoken.

*Proviso.* Persons being under the age of 21 years, feme covert, or insane, when the cause of action accrues in any of the foregoing cases, may commence the suits within the time before limited after such disability removed.

4. Actions of debt or covenant for rent, or arrearages of rent, founded upon any lease under seal, or upon any single or penal bill for the payment of money only, or on any obligation with condi-

tion for the payment of money only, or upon any award under seal, are to be commenced within 16 years after the cause of action accrues; but if any payment has been made upon any such lease, specialty or award within or after said period of 16 years, then the action may be commenced within 16 years after such payment.

*Proviso.* That the time during which the person entitled to any such action, shall be within 21 years of age, *feme covert*, or *insane*, shall not be computed as part of the period of limitation.

5. Judgment in any Court of Record may be revived, by *Scire Facias*, or an action of debt may be brought thereon within 20 years next after the date of such judgment.

*Proviso.* Like that to the last section.

There is also a general *Proviso*, That if the defendant be out of the state at the time the action accrues, or at any time during which a suit might be sustained, then the plaintiff may bring his action after the defendant's return into the state, and the time of such absence shall not be computed as part of the time limited by the act.

6. If a judgment for the plaintiff be reversed upon Writ of Error, or if after verdict for the plaintiff upon matter in arrest of judgment, the judgment be given against him, then he, his heirs, &c., may commence a new action within one year after such judgment reversed or given against him.

7. No action to be brought upon an open account, after three years from the accruing of the cause of action.

*Proviso.* Not to apply to the trade of merchandize between merchant and merchant, their factors or agents.

8. Writs of Error may issue within three years after final judgment.

#### CONNECTICUT.

"An act for the Limitation of civil actions, and of criminal "prosecutions." (*Revision of 1821, Title 59. Limitations.*)

1st. Section *enacts*, That no person shall make entry into lands, &c. but within fifteen years next after his right or title shall first descend or accrue to the same. And no such entry shall be sufficient, unless an action shall be commenced thereupon and prosecuted with effect within one year next after the making thereof.

*Proviso*, in favour of any person who "at the time of the first descending or accruing of the said right or title," is an *infant*, *feme covert*, lunatic, or prisoner, "so as such person shall, within five years next after full age, discoverture, coming of sound mind, enlargement out of prison, or the heirs of such person, shall within five years after the death of such person, bring such action or make such entry, and take benefit of the same."

2d Section ; Action on bond or writing obligatory, contract under seal, or promissory note not negotiable, must be brought within seventeen years next after an action on the same shall accrue. " *Provided* nevertheless that persons legally incapable to bring an action on such bond or writing, at the accruing of the right of action thereon, may bring the same at any time within four years after their becoming legally capable to bring such action."

3d Section ; Action of account, of debt on book, or on simple contract, of assumpsit upon implied contract, or upon any contract in writing not under seal, except promissory notes not negotiable, must be brought within six years. With the same *proviso* as in the last section, excepting only that the *saving* is *three* years instead of *four*.

4th Section ; Action of trespass on the case must be brought within six years.

"Sect 5. No action founded upon any express contract or agreement, other than actions of book debt, on proper subjects thereof, not reduced to writing or some note or memorandum thereof, made in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized ; no action of trespass ; and no action upon the case for words, shall be brought but within three years next after the right of action shall accrue."

Sect. 6. Suit for any forfeiture upon any penal Statute to be brought within one year.

Sect. 7. Suit against Sheriff, Sheriff's Deputy or Constable, "for neglect or default in his office or duty," to be brought within two years.

Sect. 8. If judgment for plaintiff be reversed by error, or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, judgment be given against the plaintiff ; he or his heirs, &c. may commence a new suit within a year ; the time during which the defendant is out of the state is not to be computed. "In all cases, herein before specified, wherein, by the laws of this state hitherto in force, no time is limited for the bringing of said actions, or a longer time is allowed therefor, than the time herein limited, such last mentioned time shall commence on, and be computed from, the first day of June, one thousand eight hundred and twenty-one.

Sect. 9. Writ of Error to reverse judgment must be brought within three years.

Sect. 10. Petition for new trial must be brought within three years after the judgment or decree complained of was rendered or made.

Sect. 11. No person shall be indicted, &c. for treason, or for any crime or misdemeanor, whereof the punishment is imprison-

ment in Newgate prison, unless within three years next after the offence shall have been committed: nor for the breach of any penal law, or for other crime or misdemeanor, excepting crimes punishable with death, or imprisonment in Newgate prison, unless within one year next after the offence shall have been committed. Provided that any action, &c. for penalty, &c. of the Law relating to the slave trade or concerning Indian, Mulatto, and Negro slaves, may be brought at any time within three years after such cause of action shall arise. Provided that if the person accused shall have fled from, or resided out of the state during the period limited as aforesaid for the prosecution of the offence charged, then he may be prosecuted at any time within such period during which he shall reside within the state after the commission of the offence. And provided, also, that where any suit, &c. "for any crime or misdemeanor, is, or shall be limited by any other statute, to be brought or exhibited within a shorter time than is hereby limited, the same shall be brought or exhibited within the time limited by such statute."

#### DELAWARE.

By the 13th Section of the 6th Article of the Constitution of the State of Delaware, it is declared, "That no Writ of Error shall be brought upon any judgment heretofore\* confessed, entered or rendered, but within five years from this time\*; nor upon any judgment hereafter to be confessed, entered or rendered, but within five years after the confessing, entering, or rendering thereof, unless the person entitled to such writ be an infant, *feme covert*, *non compos mentis*, or a prisoner, and then within five years exclusive of such disability."

Statute of Delaware, passed February 4, 1792. (2 Vol. Laws , )

Section 1. "All actions of trespass *vi et armis*, *quare clausum fregit*; all actions of detinue, trover, and replevin, for taking away goods or chattels; all actions upon account and upon the case; (other than actions between merchant and merchant, their factors and servants relating to merchandise;) all actions upon the case for words; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; and all actions of trespass, assault, battery, menace, wounding, or imprisonment, shall be commenced and sued within three years next, after, the cause of such action or suit shall accrue, and not after."

Sect. 2. *Provides*, That if any person entitled to any such action, shall at the time when the cause thereof accrues, be within the age of twenty one years, *feme covert*, *non compos mentis*, imprisoned, beyond sea or out of the state; such persons may bring their action within one year next after their coming to or being at

\* 12th June, 1792.

full age, discovery, of sound memory, at large, or returning into the state. And if the Defendant shall be out of the state, at the time of the cause of action arising, or afterwards before the time of bringing such action be expired, the Plaintiff may bring his action within three years next after Defendant's return.

Sect. 3. No person that doth not keep a regular book of accounts, "shall be admitted to prove or require payment of any account of longer standing than one year, against the estate of any person or persons dying within this state; or, in case of its consisting of many particulars, unless every item or charge in such account shall have accrued or arisen within three years next before the death of the deceased person, and unless such person or persons so pretending to be a creditor or creditors of the deceased shall be able clearly to make appear, by one good and sufficient witness at the least, that such account is just and true; and that no person or persons whatsoever, who do and shall keep regular books of accounts, shall be admitted to prove or require payment of any account against the estates of persons so dying as aforesaid, unless such account shall have accrued or arisen as aforesaid, within three years next before the decease of the deceased person." (*The residue of this Section is repealed.*)

Sect. 4. (*Repealed.*)

Sect. 5. Makes executor or administrator liable as for waste, if he pay any demand against the estate of his testator or intestate, of any longer standing than three years next before the death of his testator or intestate, &c.

Sect. 6. *Proviso* in favor of infants, *feme coverts*, persons who are of insane memory, imprisoned, or out of the state, so that their accounts against the estate of the deceased be proved, and their claims prosecuted within one year next after the removal of such disability.

Sect. 7. *Provides*, That this act shall not extend to cases arising before its passage.

Sect. 8. *Repeals* parts of former Acts.

Act of June 18th, 1793. (2 Vol. 1132, Ch. 35. c.)

Sect. 1. *Enacts*, That nothing contained in the above Act, of 4th February, 1792, "shall extend to any intercourse of traffic between merchant and merchant, according to the usual course of mercantile business, nor to any demands founded on mortgages, bonds, bills, promissory notes or settlements under the hands of the parties concerned."

Sect. 2. *Repeals* part of the third, and all of the fourth section of the Act of 4th February, 1792.

Act of 19th June, 1793. (2 Vol. 1155, Ch. 40. c.)

Sect. 1. *Enacts*, That no person shall make entry into Lands, &c. but within twenty years after his right or title first descended or accrued. Nor shall any person have any writ of right, or any action, real, personal or mixed, for, or make any prescription to or in any lands, &c. but only upon an actual seisin or possession of himself, his ancestor or predecessor, within twenty years next before suit brought. "*Provided nevertheless* that any person or persons now having right or title of entry, and the heirs of such person or persons, may, within ten years from this time proceed as might have been done heretofore: *And Provided also*, That if any person having right or title of entry, was and now is, or if any person hereafter having right or title of entry, shall be at the time of such right or title first descended or accrued, an infant, *feme covert*, *non compos mentis*, or a prisoner, then, but in no other case whatever, except as before provided, such person, or the heirs of such person, may within ten years next after the removal of such disability, but not afterwards, proceed, notwithstanding the said twenty years be expired, as might have been done before the same were expired; and if any such person shall die under any of the disabilities aforesaid, the heirs of such person shall have the like benefit that such person might have had by living till the disability had ceased."

Sect. 2. *Repeals* parts of two former acts.

Act of 2nd February, 1811. (4th Vol. 459. 463, Ch. 158.)

Sect. 22. *Repeals* all savings in favour of persons beyond sea, or out of the state, and *enacts*, that they shall bring their actions within the same times as other persons for whom no saving is given.

Sect. 27. Limits the time of appeal from any interlocutory order or final decree of the Chancellor to one year, "unless the person entitled to such appeal, be an infant, *feme covert*, *non compos mentis*, or a prisoner."

"Act concerning forcible entries and detainers," &c. passed February 2, 1827, limits proceedings upon a complaint of forcible entry, to one year. (Sect. 2.)

#### GEORGIA.

Limitation of all suits for real estate, and for entry on lands, seven years after title and cause of action shall accrue.

*Proviso*, Saving the rights of infants, *femes covert*, persons *non compos*, *imprisoned* and *beyond seas*.

Limitations in personal actions, are, on bonds under seal twenty years; on other acknowledgments *not under seal*, six years; open accounts, four years; trespass *quare clausum fregit*, three years; trespass, assault and battery, two years; slander, & *qui tam* actions, six months.

*Proviso*, The same savings as in the case of lands.

## ILLINOIS.

(*First Session, Third General Assembly; Act of February 18, 1823.*)

Limitation of "action of ejectment, writ of right, or other action for the recovery of any lands," &c., and of any avowry or cognizance thereof, ten years.

*Proviso, Saving to infants, femmes covert, persons insane, or imprisoned, their right, so as they or their heirs commence their actions within five years after disability removed.*

In case of *disseisin*, descent cast, will not toll right of entry without *ten years peaceable possession*.

(*Second Session, First General Assembly; Act of March 22d, 1819.*)

Sect. 8. Limitation of personal actions; Trespass *quare clausum fregit*; Trespass, Detinue, Trover; Replevin for taking away goods and chattels; Actions of account and upon the case, (except merchants' accounts) Actions of debt grounded upon any lending or contract without specialty; and all actions of debt for arrearages of rent; five years, (except *actions upon the case for slander*.)

Actions of trespass for assault, battery, wounding, imprisonment, or any of them, three years.

Actions of slander for words spoken, one year.

Sect. 28. Limitations of writs of error, five years; But where the party aggrieved by any decree of judgment shall be an infant, *femme covert, non compos mentis*, or imprisoned when the same was passed, the time of such disability, shall be excluded from the computation of, the said five years.

There are no other savings in this statute.

## INDIANA.

No statutory provision on the subject of real actions.

Limitation in action of ejectment, twenty years.

Limitation of personal actions; debts by specialty stand as at common law; Trover; Assumpsit; Detinue; Replevin; Trespass *quare clausum fregit*; Actions on the case; Debt; Account; five years after the cause of action accrued: Trespass; Assault; Wounding; and Imprisonment, three years; Slander for words spoken, one year.

## KENTUCKY.

Limitation of *Writs of Right* upon the seisin or possession of the ancestor or predecessor of the demandant, fifty years.

Any other *possessory* action upon the possession or seisin of the ancestor or predecessor of demandant, forty years.

Any real action upon the demandant's own possession or seisin, thirty years.

And there are no savings in favour of infants or any others.

Limitations of writs of *Formedon in descender, Remainder, or Reverter*, twenty years.

*Of Entry into Lands*, twenty years.

*Proviso*, Saving the right of infants, *femes covert*, persons *non compos mentis*, or imprisoned, and their heirs; so as they bring and maintain their action, or make their entry within ten years next after such disabilities removed, or the death of the person so disabled. (*Persons "not within this commonwealth," were also originally included in the saving, until the Act of January 22, 1814.*)

An act passed February 9, 1809, commonly called the "ten years' act," bars claims after ten years, where the claim is set up under or by an adverse interfering entry, survey, or patent, against one who had actually settled thereon (the premises) *before the passage of the act*, and to which at the time of settlement such person had a connected title in Law or Equity deducible from the *commonwealth*. And where such title is acquired *after* the settlement made, the limitation is to run from the time of such acquirement: and where possession acquired as above, has been transmitted by sale or other legal act of conveyance, the purchaser, &c., is entitled to the same benefit of the act to which the vendor was entitled.

*Exceptions*. This act shall not extend to *infants, feme covert*, or to persons of *unsound mind*; nor to persons *out of the United States*, in the service of the United States or this State; but such persons have seven years within which to sue after the disability removed, or after the expiration of their employments beyond the limits of the United States; and where the limitation shall have *begun to run, and the right or title shall by the Act of God or the operation of law, be cast upon any person within the time* of such disabilities and exceptions, the time of such disability or privilege shall not be computed as part of the Limitation.

By an act of January 22, 1814, it is declared, that persons whose causes of action accrue while they are *out of* this commonwealth, shall by the Courts of the same in every description of action relating to the title or possession of *Land*, be considered in the same light and no other or better than the citizens of this commonwealth.

And that *femes covert*, upon whom lands have descended or to whom they shall have been devised by will *during coverture*, and in no other case, shall be allowed three years only after discovery: And *infants, and persons non compos mentis, only three years*, after the disabilities removed.

Limitation of personal actions:

1. Actions on the case (other than for slander :) of account;



(other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants;) for debt, grounded upon any lending or contract without specialty; of Debt for arrearages of rent; of Trespass; of Detinue; of Replevin for goods and chattels; and of Trespass *quare clausum fregit*, five years.

2. *Actions of Trespass* for assault, battery, wounding or imprisonment, three years.

3. *Actions upon the case* for words, one year.

4. Actions founded upon *account* for goods, &c. sold and delivered, or for any article charged in any store account, within 12 months after the cause of action or delivery of the articles; but if the creditor or debtor die within that time, then *twelve months* from the death of either.

*Proviso*; Persons within the age of twenty one years, *femes covert*, *non compos mentis*, or imprisoned when the cause of action accrues, may bring their actions within the times before limited, after their respective disabilities removed. *Persons out of the Commonwealth were formerly within the savings of this Proviso, until the Act of 1st December, 1823, passed at the First Session of the Thirty second General Assembly, Chap. 572.*

And if any Defendant, to any of the aforesaid actions, absconds or conceals himself, or by removal out of the country or county where he resides where such cause of action accrues, or by any other indirect ways or means, defeats or obstructs any person having title thereto from bringing or maintaining such action within the time limited, he shall not be permitted to plead this Act in bar.

If judgment be reversed for error, or arrested after verdict, the action may be renewed by the Plaintiff, his heirs, &c. from time to time within one year afterwards.

The time between April 12, 1774, and April 12, 1778; and between January 1, 1781, and January 1, 1782; and between May 5, 1783, and October 20, 1783, are not to be accounted in any case as part of the period of Limitations.

#### LOUISIANA.

This state has properly speaking no Statute of Limitations; the law of "*prescription*" in use in this State is derived from the civil Law and differs from the English and American Statutes in this; that while those Statutes only *bar the remedy* of the true owner, without extinguishing his right; the law of prescription of Louisiana, bars both remedy and right; and moreover vests a right in the occupant, however wrongfully his possession may have been acquired. The following extracts from the "*civil code of the State of Louisiana*" indicate the difference between it and

the several Statutes of Limitations in force in this country, and in Great Britain.

TITLE 23, CHAPTER 2.

"Art. 3414. The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another."

"Art. 3415. The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective."

TITLE 23, CHAPTER 3, SECTION 1.

"Art. 3420. Prescription is a manner of acquiring property, or discharging debts, by the effect of time, and under the conditions regulated by law.

Each of these prescriptions has its special and particular definitions.

"Art. 3421. The prescription, by which property is acquired, is a right by which a mere possessor acquires the property of a thing which he possesses, by the continuance of his possession during the time fixed by law."

"Art. 3422. The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim."

TITLE 23, CHAPTER 3, SECTION 2. ●

"Art. 3435. The time necessary to prescribe for property, is different, whether the property be immoveable, slaves or moveable.

"Art. 3436. The property of immoveables and slaves is acquired by a longer or shorter time, according as the possessor has been in good or bad faith, as laid down in the following paragraph.

"Art. 3437. Immoveables are prescribed for by ten years between persons present, and twenty years between absentees, when the possessor has been in good faith, and held by a just title during that time.

"Art. 3438. The same species of property is prescribed for by thirty years without any title on the part of the possessor, or whether he be in good faith or not.

"Art. 3439. The property of slaves is prescribed for by half the time requisite for the prescription of immoveables."

"Art. 3440. The property of moveables is prescribed for after the lapse of three years."

TITLE 23, CHAPTER 3, SECTION 2. §1.

"Art. 3450. By the term *just title*, in cases of prescription, we do not understand that which the possessor may have received from the real owner, for then no prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the property.

"Art. 3451. And in this case by the phrase *transfer the property*, we understand not such a title as shall have really transferred the property, but a title which by its nature, would have been sufficient to transfer the property, provided, it had been derived from the real owner, such as a sale, exchange, legacy or donation.

Thus prescription could not be acquired under a lease or loan, because these contracts do not transfer the property.

Art. 3452. It is necessary besides :

1. That the title be valid in point of form ; for if the possession commenced by a contract void in that respect, it cannot serve as a foundation for prescription.

2. That the title be certain ; thus, every possessor, who cannot fix exactly the commencement of his possession cannot prescribe.

3. That the title be proved, for as it is created by deed it is not presumed, and every man who founds his title on an act must produce it, or prove the contents, if it be lost."

● TITLE 23, CHAPTER 3, SECTION 2. §3.

Art. 3475. When the possessor of any moveable whatever has possessed it for ten years without interruption, while the owner resided in the state, or twenty years if he resided out of it, he shall acquire the property without being obliged to produce a title or to prove that he did not act in bad faith.

TITLE 23, CHAPTER 2, SECTION 2. §6.

Art. 3488. Minors and persons under interdiction cannot be prescribed against, except in the cases provided by law.

Art. 3489. Husbands and wives cannot prescribe against each other.

TITLE 23, CHAPTER 2, SECTION 3. §1.

"Art. 3499." Enumerates the following cases as is included in the prescription of *one year*.

Actions of justices of the peace, notaries and constables, for their fees and emoluments of office

Of inn-keepers and such others for lodging and board.  
 Of retailers of provisions and liquors.  
 Of workmen, labourers and servants for wages.  
 For freight of vessels; and wages of officers and crew; (this prescription runs only from the completion of the voyage.)  
 For materials for the construction, &c. and provisioning of vessels.

"Art. 3501." gives the same period of prescription, for

"Actions for injurious words, whether verbal or written; and that for damages caused by slaves or animals, or resulting from offences or quasi offences." For delivery of merchandize, &c. on board vessels, or for damage by vessels or merchandize.

#### TITLE 23, CHAPTER 2, SECTION 3. §2.

"Art. 3503." The action for arrearages of rent charge, annuities and alimony; or for the hire of moveables or immoveables: That for the payment of money lent; for the salaries of overseers, clerks, secretaries and teachers; that of physicians, surgeons and apothecaries; that of parish judges, sheriffs, clerks and attorneys, for their fees and emoluments, are prescribed by three years, unless there be an account acknowledged, a note or bond given, or an action commenced before that time.

"Art. 3504. The action of parties against their attorneys for the return of papers deliver'd to them for the interest of their suits, is prescribed also by three years, reckoning from the day when judgment was rendered in the suit, or from the revocation of the powers of the attorneys."

#### TITLE 23, CHAPTER 2, SECTION 3. §3.

"Art. 3505. Actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by endorsement or delivery, are prescribed by five years, reckoning from the day when these engagements were payable."

"Art. 3507. The action of nullity or rescision of contracts, testaments or other acts; that for the reduction of excessive donations; that for the rescision of partitions and guarantee of the portions,

Are prescribed by five years, when the person entitled to exercise them is in the state, and ten years if he be out of it."

#### TITLE 23, CHAPTER 2, SECTION 3. §4.

"Art. 3508. In general, all personal actions except those enumerated, are prescribed by ten years, if the creditor be present, and by twenty years if he be absent."

## MAINE.

After the 15th of March, 1825, the following Limitations of Actions are prescribed :

Writs of *Right* upon the seisin of ancestor or predecessor of demandant ; thirty years.

Writ of entry upon disseisin of ancestor or predecessor, or possessory action upon the possession of ancestor or predecessor ; twenty five years.

Any action upon demandant's own seisin ; twenty years.

Writs of *Formedon*, in descender, remainder and reverter ; twenty years.

Entry into Lands, must be made within twenty years.

*Proviso*, When any person that is or shall be entitled to any of the Writs of *Formedon* aforesaid, or to make any entry into lands, tenements or hereditaments, shall at the time the said right or title first descended, accrued or fell, be within the age of *twenty one years, feme covert, non compos*, imprisoned or beyond seas, or without the limits of the United States, that then such person shall and may bring such suit or make such entry, at any time within *ten years* after the expiration of the said twenty years aforesaid, and not afterwards.

There is also a provision, that if the proprietor or owner make entry into lands, &c. " which the tenant or those under whom he claims, have had in actual possession for the term of *six years* or more before such entry, and withhold from such tenant the possession thereof, such tenant may in an action for money laid out and expended recover from the proprietor or owner the *increased value* of the premises, by virtue of the buildings and improvements made by such tenant or those under whom he claims. Provided such entry by the owner shall have been made while the tenant was in the actual possession of the premises and against his consent.

In real actions, where the tenant has held as a disseisor for more than six years before the commencement of the suit, the value of the premises may be ascertained by the jury, and also the value of the demanded premises without the improvements ; and if during the term in which such verdict shall have been given, the demandant shall make his election on record, in open court, to abandon the demanded premises to the tenant at the price estimated by the jury exclusive of the improvements, then no judgment for possession shall be rendered on the verdict, but judgment for the sum so estimated.

#### Limitation of personal actions.

Actions upon the case other than slander ; actions of account other than such accounts as concern the trade of merchandize between merchant and merchant ; Trespass ; Debt ; Detinue and

Replevin for goods and chattels ; Trespass *quare clausum fregit* ; *six years.*

Actions of Trespass, of Assaults, Battery, Wounding or Imprisonment ; *three years.*

Actions upon the case for words ; *two years.*

If upon any of the above mentioned actions, judgment be given for the Plaintiff, and the same be reversed, the Plaintiff, his executor or administrator, may commence a new action within a year after such reversal.

Actions of debt upon specialties, and actions brought by original promisees, their executors, or administrators, upon notes attested by one or more witnesses, are not limited by Statute, but remain as at common law.

*Proviso ; Infants, femes covert, persons non compos mentis, imprisoned, beyond sea, or without any of the United States, may after disability removed, bring suit within the times respectively limited therefor.*

If the Defendant, at the time the cause of action accrued, was without the limits of the state, and did not leave property or estate therein, that could by the common and ordinary process of law, be attached ; the Statute will not run until his return into the state.

Writs of Error upon Judgment, are limited to twenty years after the rendition of the judgment ;

*Proviso ; saving the rights of infants, femes covert, and persons non compos mentis, so that they, their heirs, executors or administrators, may bring their Writ of Error within five years after the coming of age, discoverture, coming of sound mind, or death of such person, whichever shall first happen.*

Actions against Sheriffs for misconduct, or negligence of their deputies, must be brought within four years.

Actions against executors or administrators, as such, must be brought within *four* years from the time of his accepting that trust, (provided legal notice has been given of his appointment,) except demands arising upon contract, which do not become due until after said term of four years ; and then the claimant must *within* the four years file such demand at the probate office.

Actions on penal Statutes, where forfeiture is limited in part or in whole to the prosecutor, must be commenced within *one year* ; and in default of such pursuit, the same may be prosecuted for the State, at any time within two years after the offence committed, except when any action shall be limited by any penal Statute to be commenced in a shorter time.

#### MARYLAND.

The Statute of Limitations of 21 Jac. 1. c. 16, has been adopt-

ed as law in Maryland ; but the Statute of 32 *Henry 8, Ch. 2.* has not.

Limitation of personal actions, (*Act of 1715, Ch. 23.*)

Actions of Trespass *quare clausum fregit* ; Trespass, Detinue, Trover or Replevin for taking away goods or chattels ; actions of account, contract, debt, book or upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants, which are not residents within the state ; (and except actions on the case for words ;) all actions of debt for lending or contract without specialty ; actions of debt for arrearages of rent ; *three years.*

Actions on the case for words ; actions of trespass for assault, battery, wounding and imprisonment, or any of them ; *one year.*

Savings of the rights of *infants, femes covert, persons non compos mentis*, imprisoned or beyond seas, who may bring their actions within the respective times before limited, after their disability has ceased.

" No Bill, Bond, Judgment, Recognizance, Statute Merchant, " or of the Staple, or other specialty whatsoever, except such as " shall be taken in the name or for the use of our Sovereign Lord " the King his heirs and successors shall be good and pleadable " or admitted in evidence against any person or persons of this " province after the principal debtor and creditor have been both " dead twelve years or the debt or thing in action above twelve " years standing ; saving to all persons that shall be under the " aforementioned impediments of infancy, coverture, insanity of " mind, imprisonment or being beyond the sea, the full benefit of " all such Bills, Bonds, Judgments, Recognizances, Statutes Mer- " chant or of the Staple, or other specialties for the space of five " years after such impediment removed."

Persons absenting themselves from the state or removing from county to county, shall have no benefit of the limitations in the act, unless they leave effects sufficient and known for the payment of their debts, in the hands of some person or persons who will assume the payment thereof to their creditors.

● ACT OF 1715, CH. 24, SECTS. 21 & 22.

All actions upon administration and testamentary bonds, shall be commenced within twelve years after the passing of the said bonds. *Proviso*, that *infants, femes covert, persons non compos mentis*, imprisoned, or beyond seas, may bring their actions on such bonds, within six years after disability removed.

ACT OF 1729, CH. 25, SECTS. 3 & 4.

Actions on Sheriff's bonds, must be brought within five years.

*Provided*, that persons under disability, may bring their actions within five years after disability removed.

By an Act passed February, 1819, the exceptions in favour of "Persons beyond seas," is *repealed* in every case.

### MASSACHUSETTS.

(*Act of March 2d, 1808.*)

Limitations of real Actions; *Writ of Right*, upon the possession or seisin of the demandant's ancestor or predecessor; forty years.

*Writ of Entry* upon disseisin of Demandant's ancestor or predecessor; or any action possessory upon possession of demandant's ancestor or predecessor; thirty years.

Any action upon demandant's own seisin or possession, thirty years. (*Act of July 4, 1786.*)

*Writs of Formedon*, in descender, remainder, or reverter; twenty years—and the same limitation of Entry into lands.

"*Provided always*, That when any person that is or shall be entitled to any of the writs of *Formedon* aforesaid; or to an entry into lands, tenements or hereditaments, shall at the time the said right or title first descended, accrued or fell, be within the age of twenty-one years, feme covert, non compos, imprisoned, or beyond seas, or without the limits of the United States, that then such person shall and may bring such suit, or make such entry at any time within ten years after the expiration of the twenty years aforesaid, and not afterwards."

Where an action is commenced for the recovery of land which the tenant in possession or those under whom he claims has had in actual possession for the term of six years or more before the commencement of such action, the jury which tries the same if they find a verdict for the demandant, shall (if the tenant request the same) also enquire and by their verdict ascertain the increased value of the premises, at the time of trial by virtue of the buildings and improvements made by such tenant, or those under whom he may claim; and (if the demandant shall require it) what would have been the value of the demanded premises, had no buildings or improvements been made by such tenant, or those under whom he may claim; and the demandant may then, "during the term in which such verdict may be given" "make his election on record in open court to abandon the demanded premises to the tenant at the price estimated by the jury as aforesaid;" "but if the demandant shall not make such election no writ of seisin or possession shall issue in his favour, unless he shall within one year have paid into the clerk's office or otherwise as the court may appoint, such sum with the interest thereof as the jury shall have assessed for buildings and improvements as aforesaid." (*Acts of March 2, 1808; March 2, 1810; & February 22, 1820.*)



Limitation of personal actions (*Act of 13 February, 1787.*)

Trespass *quare clausum fregit*, trespass, detinue, trover or replevin, for goods or cattle; all actions of account and upon the case, other than such as concern the trade of merchandize between merchant and merchant, their factors or servants; (and except actions upon the case for words) actions of debt grounded upon any lending or contract without specialty; six years.

Actions of trespass, of assault, battery, wounding, imprisonment, or any of them; three years.

Actions upon the case for words: two years.

*Proviso*, That if judgment for plaintiff be reversed for error; or upon matter in arrest of judgment, after verdict for plaintiff, judgment be given against him; he, his executor or administrator, may bring a new suit within a year thereafter.

"This act shall not be understood to bar any infant, *feme covert*, person imprisoned, or beyond sea, without any of the United States, or *non compos mentis*, from bringing either of the actions before mentioned, within the term before set and limited for bringing such action, reckoning from the time that such impediment shall be removed."

If the defendant at the time the cause of action against him accrued was without the limits of the commonwealth, and did not leave property or estate therein that could, by the common and ordinary process of law be attached; then the plaintiff may bring suit within the respective periods before limited, after the defendant's "return into this government."

This act not to bar any action to be brought by the original promisee, his executor or administrator, upon any promissory note in writing for the payment of money attested by one or more witnesses; but such action, "shall and may be maintained as if this act had never been made."

"No *scire facias* shall be served upon the bail, unless it be done within one year next after the entering up final judgment against the principal." (*Act of 30 June, 1784.*)

Action against executor or administrator must be brought within three years next following his giving bond, (provided he has given notice of his appointment as the act directs;) but if the demand would not be due or payable until after the said term of three years, then the creditor may *within* the said three years file "such future demand at the office of the Probate court, where administration was granted or the will approved;" and such court shall direct the executor or administrator to retain sufficient assets, "unless the heirs or devisees shall give sufficient security for such executor or administrator to respond such demand." Or if the claimant omit to file such demand as aforesaid he may have his remedy against those who inherit the estate, if such claim be made within one year from the time of its becoming due.

But this act shall not operate to bar any action against an executor or administrator with the will annexed for any legacy, bequest, gift or annuity, accruing, &c. by virtue of any last will and testament. (*Act of 14th February, 1789.*)

In "any action of the case, or of debt grounded upon any lending or contract, or for arrearages of rent, which shall have been actually declared in, if the writ purchased therefor has failed of a sufficient service or return by any unavoidable accident, or by the default, negligence or defect of any officer to whom such writ was duly directed or when such writ shall be abated or the action thereby commenced shall be avoided by demurrer or otherwise for informality of proceedings; then the plaintiff may commence another action upon the same demand and shall thereby save the limitation thereof." *Provided, that such second section shall be duly commenced by declaring in the same aforesaid, and pursued at the next court of common pleas of the county in which trial of the cause may be had, or within three months next after the court whereto such former writ, was or shall be returnable, or wherein judgment of abatement or other avoidance of such suit shall happen, and not afterwards.*" (*Act of February 27, 1794.*)

"Any action of the case, or of debt, grounded upon any lending or contract, or for arrearage of rent, which might have been or which may be sued and prosecuted by or against any person deceased, or who shall decease, at the time of his or her death, or within thirty days next preceding, shall and may be commenced by declaring in the same as aforesaid, and sued by or against the executor of such deceased person, within two years after the grant of letters testamentary or of administration, and not afterwards, if otherwise barred by the said act for the limitation of personal actions, and for the avoiding suits at law, any thing which may be supposed therein to the contrary notwithstanding." (*Ibid.*)

### MISSISSIPPI.

Every action, of whatever kind, for the recovery of lands, tenements and hereditaments, must be brought within thirty years after the title accrues.

*Proviso*; saving the rights of infants, insane persons, and *femes covert*.

Limitation of personal actions.

Debt on bond or other specialty; *sixteen years.*

Actions of trespass *quare clausum fregit*; detinue, trover, and replevin for taking away goods and chattels, debts on simple contract, actions of account and upon the case, (except slander and accounts between merchants); *six years.*

Trespass *vi et armis*; two years.

Slander; one year.

*Proviso*, saving the rights of persons absent from the state, in all the above specified cases until their return; and saving the rights of infants, and *femes covert*, in slander *debt on specialty*, and *covenant an specialty*, until their disabilities are removed.

### MISSOURI.

Limitation of actions for real property.

All actions of whatever kind or description, for any lands, tenements, or hereditaments, are limited to *twenty years*; and every entry into lands must be made within twenty years after the title to the same first descended or accrued. (*Act of 21 February 1825, Sect. 2.*)

Persons "within the age of twenty-one years, *femme covert*, "*non compos mentis*, imprisoned, beyond seas or without the limits and jurisdiction of the United States of America," may bring action or make entry within twenty years after their disabilities removed; "and in case such person or persons shall die within the said term of twenty years, or under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit that such persons would or might have had by living until their disabilities should have ceased or been removed." (*Ibid. Sect. 3.*)

Limitation of personal actions. (*Act. of 21 February, 1825. Section, 1.*)

"All actions of debt founded on any writing, whether under seal or not, and all actions of assumpsit founded on any promissory note, or other writing for the direct payment of money shall be commenced and sued within ten years next after the cause of action shall have accrued; and all actions of Trespass *quare clausum fregit*; all actions of trespass, detinue and trover; for taking away or conversion of goods and chattels; all actions of debt founded upon any lending or contract without writing, or for arrearages of rent due on a parcel demise; and all actions of account, and upon the case, except actions for slander, and except also such actions as concern the trade or merchandize between merchant and merchant their factors agents and servants;—shall be commenced and sued within five years next after the cause of such actions shall have accrued. And all actions on open accounts for goods wares and merchandize, sold and delivered or for any article in any store account, and all actions of trespass, for assault and battery, and false imprisonment, shall be brought within two years next after the cause of such action shall have accrued. And all actions on the case for words, and all actions of replevin, shall be brought within one year next after the cause of such actions

"shall have accrued. And all writs of error shall be brought within five years after the rendition of the judgment, order or decree complained of, and not after. *Provided*, That if any person, entitled to any of the before mentioned actions, shall, at the time the cause of action accrued, be within the age of twenty-one years, female covert, insane or imprisoned, or beyond sea, or absent from the United States, such person may bring such actions within such times as are before limited, after the respective disabilities are removed: *and provided, also*, That if in any of the before mentioned cases, any plaintiff obtain a judgment, which upon appeal or writ of error shall be reversed; or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his writ; or if any plaintiff shall suffer non-suit, —such plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action or suit, from time to time, within one year after such judgment recovered, or arrested, a non-suit suffered, as aforesaid, and not after: *Provided, also*, That if any defendant in any civil or criminal action, by absconding or concealing himself, or by removal out of the state, territory or district where such cause of action accrued, or by any other indirect means, shall defeat or obstruct the bringing or maintaining all or any of the aforesaid actions within the respective times limited by this act, such defendant shall not be permitted to avail himself of the benefit of this act."

Suits against. "*Security*" on administration bond, must be brought within seven years after the revoking, repealing, or surrendering the letters, or the death of his principal. (*Act of January 17, 1825—Proviso to Section 20.*)

All demands against the estates of deceased persons, must be exhibited within three years after administration granted, or they will "be for ever barred; saving, however, to married women, infants, persons of unsound mind, or imprisoned, the time of five years after their respective disabilities are removed." (*Ibid. Sect. 50.*)

Suits for desertion against clerk, apprentice or servant, bound by indenture, must be brought within six years after he shall arrive at full age. (*Act of January 19, 1825, Proviso to Sect. 16.*)

Suits on Constable's Bonds, limited to one year from the expiration of the time for which such Constable was appointed. (*Act of February 8, 1825, Proviso to Sect. 3.*)

Claims against the state for escheated lands, must be made within five years; "saying, however, to infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions as aforesaid, at any time within five years after their respective disabilities are removed." (*Act of December 18, 1824, Sect. 9.*)

Actions on Notary's Bond, limited to three years after the cause of action shall have accrued. (*Act of December 9, 1824, Provided to Sect. 7.*)

Limitations of criminal prosecutions.

Act to regulate proceedings in criminal cases; (approved January 14, 1825.)

"Sect. 41. *Be it further enacted*, That no person or persons shall be prosecuted, tried or punished, for any felony, (treason, murder, arson and forgery, excepted;) unless the indictment for the same shall be found by a Grand Jury, within three years next, after the offence shall have been done or committed; nor shall any person be prosecuted, tried or punished, for any misdemeanor or other indictable offence below the grade of felony, or for any fine or forfeiture, under any penal Statute, unless the indictment or information for the same, shall be found or instituted within one year from the time of committing the offence or incurring the fine or forfeiture: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice: *And provided, also*, That where any suit, information or indictment, for any crime or misdemeanor, is limited by any Statute to be brought or exhibited within any other time than is hereby limited, then the same shall be brought within the time limited by such statute: *Provided, also*, That where any indictment or information shall be quashed, or the proceedings on the same set aside or reversed, the time during the pending of the said indictment or information shall not be reckoned within this Statute, so as to bar any new indictment or prosecution for the same offence."

#### NEW HAMPSHIRE.

Limitation of actions for real property.

No person can maintain any action for the recovery of Lands, unless upon a seisin within twenty years.

There is a saving of five years after disability removed, to such as were, at the time the right or title descended or accrued to them, either *under twenty one years of age, feme covert, non compos mentis, imprisoned, or without the limits of the United States.*

Limitation of personal actions.

There is no Statute limiting the time for bringing suits on specialties.

Other personal actions are limited to *six years* after the cause of action accrues; except that actions of trespass, assault, battery, &c. are limited to three years, and actions of slander to two years; with a saving in favour of *infants, femmes covert, persons imprisoned, or beyond seas, without the United States, or non compos mentis*, of the whole time aforesaid after disability removed; and if the person against whom the suit is brought, left the state before the ac-

tion accrued, and left no property here that could be attached, &c. then the whole time is allowed after he returns.

Prosecutions for the penalties and forfeitures mentioned in the "Act more effectually to secure to the citizens of this state, their rights of suffrage," (*Passed June 26, 1827,*) are by the 16th Section thereof limited to six months.

Suits for the penalties and forfeitures mentioned in the "Act regulating Towns and the choice of Town Officers," (*Passed June 28, 1827,*) under the sum of thirteen dollars and thirty three cents, are limited to three months. (*Sect. 16.*)

#### NEW JERSEY.

(*Act for the Limitation of actions passed 7th February, 1799,*)

Sect. "10. And be it enacted, That from and after the first day of January, which will be in the year of our Lord one thousand eight hundred and three, every real, possessory, ancestral, mixed or other action, for any lands, tenements or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after: *Provided always*, That the time, during which the person, hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, *feme covert*, or *insane* shall not be taken or computed as part of the said limited period of twenty years."

Sect. 9. Limits the time of entry into lands, &c. to twenty years; but with the same *proviso*, as is contained in Section 10.

Section 1. Limits all actions of trespass *quare clausum fregit*; trespass, detinue, trover and replevin, for taking away of goods and chattels; all actions of debt founded on any lending or contract, without specialty, or for arrearages of rent founded on a parol demise, and all actions of account and upon the case, except actions of slander and except also such actions as concern the trade or merchandize between merchant and merchant, their factors, agents and servants, to six years.

Section 2. Limits all actions of trespass for assault, menace, battery, wounding and imprisonment, or any of them, to four years.

Section 3. Limits actions upon the case for words to two years.

Sect. "4. *Provided always, and be it further enacted*, That if any person or persons, who is, are or shall be entitled to any of the actions specified in the three preceding sections of this act, is are or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, *feme covert*, or *insane*, that then such person or persons shall be at liberty to bring the said action so as he, she or they institute or take the

"same within such time as is before limited, after his, her or their coming to or being of full age, discover, or of sane memory, as by other person or persons, having no such impediment, might be done."

Sect. 5. Limits actions on sheriff's bonds to nine years after the date of the bond; or the "securities" will not be liable. (*The Sheriff is elected annually.*)

Sect. 6. Limits actions of debt or covenant for rent or arrearages of rent, founded upon any lease under seal, whether indentured or poll; actions of debt upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only, or upon any award under the hands and seals of arbitrators for the payment of money only, to sixteen years. "But if any payment shall have been made on any such lease, specialty or award within or after the said period of sixteen years," then suit may be brought within sixteen years after such payment. With a *proviso* containing the same savings as the *proviso* to section 10.

Sect. 7. And be it enacted, That judgments in any court of record of this state may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after the date of such judgment, and not after: *Proviso*, the same as that to section 10.

Sect. 8. Is repealed, and supplied by act of February 21, 1820, which enacts, "That if any person or persons, against whom there is or shall be any such cause of action as is specified in the first, second, third, fifth, sixth and seventh sections of the act to which this is a supplement, shall not be resident in this state when such cause of action accrues, or shall remove from this state after the same shall accrue and before the time of limitation mentioned in said sections is expired, then the time or times during which such person or persons shall not reside in this state as aforesaid shall not be computed as part of the said limited period within which such action or actions are required to be brought as aforesaid; but the persons having or who may have such cause of action as aforesaid, shall be entitled to all the time mentioned in the said several sections, for bringing their said actions after the cause thereof shall accrue, exclusive of the time or times during which the person or persons liable to such actions shall be not resident in this state as aforesaid."

Sect. 11. And be it enacted, That if a mortgagee and those under him, be in possession of the lands, tenements and hereditaments contained in the mortgage or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption therein shall be forever barred."

Sect. 12. *Provides*, That if judgment be given for the plaintiff and reversed by writ of Error, or if after verdict for him upon

matter in arrest of judgment, the judgment be given against him, then he or his representatives in case of his death may commence a new action within one year.

Sect. 13. Limits suits by the state, for land, to *twenty years*.

Sect. 14. Creditors must bring in their debts demands and claims within such time not exceeding two years, nor less than one year, as the orphan's court of the proper county shall direct (of which public notice shall be given by the executor or administrator in the manner pointed out in the statute). Or be forever barred of their actions therefor against such executors or administrators.

Sect. 15. Limits all actions, &c. for any forfeiture which is limited to the state only by any penal statute; to two years. If the forfeiture is given to any person or persons who shall prosecute for the same, or to the state of New-Jersey, and to any other who shall prosecute in that behalf; then the action by the informer is limited to one year; "and in default of such pursuit," suit may be brought for the state, "at any time within one year after the termination of the aforesaid year and not after." Where the forfeiture is given to the party aggrieved, suit may be brought within two years: With *Proviso*, That where any action is by any statute limited to a shorter time than is limited by this section, then such action shall be brought within such shorter time.

Sect. 16. Repeals the former Statute of Limitations passed 10th *February*, 1727-8.

Action of debt against solicitor or attorney at law, for extortion, limited to *one year*, by 10th section of the "act to regulate the practice of the law," passed 14 *February*, 1799.

Action of debt to recover the penalties imposed by the "act to prevent horse-racing," (passed 15th *February*, 1811) is limited to six months.

Action of debt to recover the penalties imposed by the "act to prevent gaming," (passed 8th *February*, 1797) is limited to six months.

Suit for offences against the "act relating to hawkers, pedlers and petty chapmen," (passed 7th *March*, 1797) are limited to three calendar months.

Action for desertion against clerk, apprentice or servant, (bound by indenture) limited to six years after he shall arrive at full age.

Prosecutions for offences against the "act for suppressing vice and immorality," (passed 16th *March*, 1798,) limited to thirty days.

Prosecutions for offences against the "act to prevent the unlawful waste and destruction of timber, within this state," (passed the 28th of *February*, 1820) limited to "eighteen months."

Prosecutions under the "act to alter and amend the act, entitled



'an act concerning inns and taverns','' (passed 1st June, 1820,) limited to six calendar months.

Limitations in criminal cases.

For treason, or other offence punishable with death (murder excepted) indictment must be found within three years after the offence committed. For any offence not punishable with death, indictment must be found within two years. " *Provided*, That nothing herein contained shall extend to any person fleeing from justice." (" *an act for the punishment of crimes*" passed 18th of March, 1796.—section 73.

NEW YORK.

The "*Act for the Limitation of Criminal Prosecutions, and of Actions and Suits at Law*," Passed 26th February, 1788, (*Laws N. Y. Greenleaf's Ed. Vol. 2, page 93. Jones & Varick's Ed. Vol. 2, page 260*;) is in substance as follows:

Sect. 1. After the first of January, 1800, no suit shall be brought by the people of this state for lands, but within forty years next after their title shall have accrued.

Sect. 2. No person shall "hereafter and" before the first of January, 1800, sue any writ of right, or make any prescription, title or claim, to or for any lands of the seisin or possession of his ancestor or predecessor but within sixty years.

Sect. 3. "No manner of person or persons shall hereafter and before the said first day of January," 1800, have any possessory action upon the seisin or possession of his ancestor or predecessor, but within fifty years.

Sect. 4. "No manner of person or persons, shall hereafter and before the said first day of January," 1800, have any action upon his own seisin or possession, but within thirty years.

Sect. 5. "No manner of person or persons shall hereafter, and before the said first day of January," 1800, make any avowry or cognizance for any rent, suit or service, but within fifty years.

There are no savings to any of the above sections.

Sect. 6. "From and after the said first day of January," 1800, no real action to be maintained, nor avowry or cognizance made but on a seisin or possession of demandant or plaintiff, or his ancestor or predecessor, "within twenty five years next before such action brought, or avowry, or cognizance made; with a saving, that no part of the time, during which the demandant or plaintiff, or person making avowry or cognizance, shall have been within the age of twenty-one years, insane, feme covert, or imprisoned, shall be taken as part of the said period of limitation of twenty-five years."

Sect. 7. Persons not proving that they, or their ancestors, or

predecessors, were in actual possession or seisin, within the times above limited, to be for ever barred.

Sect. 8. Writs of *Formedon*, and *Scire Facias*, upon fines of land, to be brought "within twenty years next after the title and cause of action first descended or fallen."

Sect. 9. No entry into lands to be made but within twenty years after "right or title descended or accrued." And no entry or claim to be sufficient, unless an action be commenced thereupon, within one year.

Sect. 10. Actions of Trespass *quare clausum fregit*; actions of trespass, detinue, trover and replevin, for taking away of goods and chattels; "actions of account, and upon the case, other than such actions as concern the trade of merchandize between merchant and merchant, their factors and servants;" actions upon the case, other than for slander; actions of debt grounded on any lending or contract without specialty; actions of debt for arrears of rent; "all suits and actions in the Court of Admiralty, for seamen's wages," are limited to six years after cause of action; actions of trespass for assault, menace, battery, wounding and imprisonment, or any of them, limited to four years; actions upon the case for words, limited to two years next after the words spoken.

Sect. 11. Has only the same provision as the *first Proviso*, in the 5th Section of the revised Act, [of 8th April, 1801:] entitled "*An Act for the Limitation of Criminal Prosecutions and of Actions at Law.*" (*Vide, post.*)

Sect. 12. *Provides*, that if, when entitled to a *Formedon*, or *Scire Facias*, or if at the time the right or title of entry first descended, accrued or fell, the person entitled, be "within the age of one-and-twenty years, *feme covert*, insane, or imprisoned, that then such persons, or their heirs after the said twenty years be expired, may bring such action or make such entry as they "might have done before this Act," so as they do it within ten years after such disability removed, or if heir within ten years after the death of his ancestor. And it *further provides*, that persons entitled to any of the actions specified in the 10th Section, may if at the time, under any of the before mentioned disabilities, bring suit after such disability removed, so as they bring such actions, &c. "within such times as before limited," "as other persons having no such impediment should have done." And it *moreover provides*, that if in any of the said actions specified in the said 10th Section, the Defendant "be out of this state, at the time of any such cause of suit or action, given or accrued, fallen or come, then," the plaintiff may bring his suit after defendant's return or coming into this State, so as such suit be brought within such times as are before limited.

Sect. 13. Is the same as Section 6, of the Act of 8th April, 1801. (*Vide, post.*)

Sect. 14. Is, with the 1st Section of the "ACT to explain the Law concerning the Limitation of Criminal Prosecutions, and for other purposes." Passed 6th April, 1790," (Laws of New-York, 13th Session Ch. 55. Vol. 2, Greenleaf's Ed. page 328;) the same as the 7th Section of the said Act of 8th April, 1801. (*Vide, post.*)

Sect. 15. Is the same as Section 8, of the said Act of 8th April, 1801. (*Vide, post.*)

By the 9th Section of the ACT instituting a Court for the Trial "of Impeachments and the correction of Errors," Passed 23d November, 1784." (7th Session, Ch. 11. Greenleaf's Ed. Laws of N. Y. Vol. 1, 149;) All appeals from the Court of Chancery, "except those from final decrees," must "be made within fifteen days next after making the orders or decrees so appealed from."

The 10th Section prescribes the same limitation to appeals from the Court of Probates, and from the Court of Admiralty.

And by the 12th Section "All writs of Error upon judgments in the Supreme Court, and appeals from definite sentences in the Court of Chancery," "must be brought within five years next after rendering the judgment or making the decree, and not after."

And the 9th Section of the Act of 24th Session, Ch. 10, entitled, "An ACT concerning the Court for the Trial of Impeachments, and the Correction of Errors." Passed 20th February, 1801. (Kent & Radcliff's Ed. Vol. 1, page 185,) is in these words, "And be it further enacted, That all appeals from the said court of chancery, except those from final decrees, and all appeals from the said court of probates, shall be made within fifteen days after making the sentence, judgment, decree or order, appealed from, and all appeals from final decrees in the said court of chancery, and all writs of error upon judgments in the supreme court, shall be brought within five years, after making such decree or rendering such judgment, and not after." This same Statute is inserted *verbatim*, in *Van Ness & Woodworth's Ed. Vol. 1, page 132. & Seq.*

The following Act [20th Session, Ch. 53,] provides against suits brought for the recovery of claims against forfeited estates after a certain period. It is contained in 3 *Greenleaf's Edition* of the Laws of New York, page 428; and has been retained *verbatim* in the two subsequent revisions of 1802, (*Kent & Radcliff's*), Vol. 1, page 162, and of 1813, (*Van Ness & Woodworth's*), Vol. 1, page 128:

"An ACT limiting the Period of bringing Claims and Prosecutions against Forfeited Estates.

"Passed 28th of March, 1797.

"WHEREAS the title deeds and other documents relative to forfeited estates were generally carried away by the former proprietors, whose conduct caused their forfeiture, and the title of the

"state as resulting from such forfeitures is thereby peculiarly liable to be obscured or defeated : Therefore,

"I. *Be it enacted by the People of the State of New-York, represented in Senate and Assembly,* That no person or persons, bodies politic or corporate, who now have, or shall or may hereafter have any estate, right, title, claim or demand, in or to any lands, messuages, tenements or hereditaments supposed to have been forfeited to the people of this state, in consequence of the attainer or conviction of any person or persons for any act or crime done or committed during the late war, and which have been heretofore granted or conveyed to any person or persons, bodies politic or corporate, by the commissioners of forfeitures, or other person or persons duly authorised for that purpose on the part of this state, shall, after the expiration of five years from and after the passing of this act, and where the estate, right, title, claim or demand shall hereafter accrue, then after the expiration of five years after the same shall so accrue, have, prosecute, sue or maintain any action or suit at law for the recovery thereof, against the right or title so granted or conveyed by the people of this state, as above said.

"II. *And be it further enacted,* That if any person or persons, bodies politic or corporate, shall and do at any time after the said respective periods of five years, sue or prosecute any suit or action at law, or make any title or claim of, in or to any of the said lands, tenements or hereditaments so as aforesaid granted by such commissioners of forfeitures, or other person or persons duly authorised for that purpose on the part of this state, that then and in such case, such person or persons, bodies politic or corporate, their heirs and successors, so suing or prosecuting such suit or action, shall from thenceforth be utterly barred forever of all and every such suit or action, estate, right, title or claim so thereafter to be sued, prosecuted or had of, in and to the same, against the right or title so granted or conveyed by the people of this state as aforesaid.

III. *Provided always, and be it further enacted,* That if any person or persons who is, are or shall be entitled to sue or prosecute such suit or action, or who hath, have, or shall have such right or title, shall be within the age of twenty-one years, *feme covert*, or insane, that then such person or persons, his, her and their heirs and assigns, shall or may at any time within five years next after his, her or their coming to full age, or of sound mind, or discovery, bring, sue and prosecute such suit or action, and at no time thereafter."

The 11th Section of the Act of 24th Session, Ch. 65, entitled "*An Act to prevent unjust Imprisonment, by securing the Benefit of the Writ of Habeas Corpus.*" Passed 24th March, 1801. (*Kent & Radcliff's Edition, Vol. 1, page 290.*) contains the following proviso: "*Provided nevertheless, That no person shall be sued or*

"molested for any offence against this act unless within two years  
 "after the time when such offence shall be committed, in case the  
 "party grieved shall not then be in prison; and if in prison, then  
 "within the space of two years after the decease of the person  
 "imprisoned, or his delivery out of prison, which shall first hap-  
 "pen; and in every such action or information it shall be lawful  
 "for the defendant to plead the general issue and give the special  
 "matter in evidence.

The same *proviso* is inserted *verbatim*, in the 11th Section of the Act bearing the same title, passed April 5th, 1813, *Sess.* 36, Ch. 57. (*Van Ness & Woodworth's Ed. Vol. 1, page 357.*) And in the Act of 10th Session, Ch. 39, entitled "*An Act for the better securing the Liberty of the Citizens of this State, and for Prevention of Imprisonments,*" Passed 21st February, 1787. (*Greenleaf's Ed. Vol. 1, page 369, 373,*) the 9th Section contains the same provision in nearly the same words.

LAWS OF NEW-YORK,—TWENTY-FOURTH SESSION.

CHAP. CLXXXIII.

*An ACT for the Limitation of Criminal Prosecutions and of Actions at Law.*

Passed 8th April, 1801.

"I. *BE it enacted by the People of the State of New-York, re-  
 "presented in Senate and Assembly, That the people of this state  
 "will not sue or implead any person, body politic or corporate, for  
 "or in respect to any lands, tenements or hereditaments, other  
 "than liberties or franchises, or the issues or profits thereof, by  
 "reason of any right or title of the said people to the same, which  
 "shall not have accrued within the space of forty years before  
 "any suit or other proceeding for the same be commenced, unless  
 "the said people or those under whom they claim, shall have re-  
 "ceived the rents and profits thereof, or of some part thereof,  
 "within the said space of forty years; and in every case where  
 "such title shall not have accrued within the time aforesaid, un-  
 "less such rents and profits shall have been received as aforesaid,  
 "the person, body politic or corporate holding such lands, tene-  
 "ments or hereditaments, other than liberties or franchises, shall  
 "freely hold and enjoy the same against the said people, and also  
 "against all persons claiming by or under them, except such per-  
 "sons shall claim by virtue of any letters patent or grants from  
 "the said people made upon suggestion of concealment or wrong-  
 "ful detaining, or defective title, upon which a verdict, judgment  
 "or decree in some court of record in this state shall have been  
 "given for such lands, tenements or hereditaments in favor of the  
 "said people, or of such patentee or grantee, his or their heirs  
 "or assigns, within the said space of forty years before commenc-  
 "ing any suit or other proceeding for the same.*

"II. *And be it further enacted, That no action for the recovery  
 "of any lands, tenements or hereditaments shall hereafter be main-*

"tained, nor any avowry or cognizance be made, unless on a seisin or possession of the hereditaments, either of the plaintiff or person making avowry or cognizance, or of the ancestor or predecessor of such plaintiff or person making avowry or cognizance, within twenty-five years next before such action brought or avowry or cognizance made: *Provided always*, That no part of the time during which the plaintiff or person making avowry or cognizance shall have been within the age of twenty-one years, insane, *feme covert* or imprisoned, shall be taken as a part of the said limitation of twenty-five years; and if any such action be brought or avowry or cognizance made and such seisin or possession be not proved by the plaintiff in such action or person making such avowry or cognizance, such plaintiff and such person making such avowry or cognizance, and their heirs and successors respectively, shall for ever thereafter be barred from bringing such action or making such avowry or cognizance.

"III. *And be it further enacted*, That all writs of *scire facias* upon fines of any manors, lands, tenements or hereditaments, hereafter to be brought, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen and not after; and no person shall at any time hereafter make any entry into any manors, lands, tenements or hereditaments but within twenty years next after his right or title descended or accrued to the same, and in default thereof such person so not entering and his heirs shall thereafter be barred from making such entry: *And further*, That no claim or entry of or upon any manors, lands, tenements or hereditaments shall be a sufficient entry or claim within the meaning of this act, unless an action shall be commenced thereupon within one year next after the making of such entry or claim, and prosecuted with effect: *Provided*, That if any person entitled to any such writ of *scire facias*, or to make such entry, be at the time such right or title first descended or accrued within the age of twenty-one years, *feme covert*, insane or imprisoned, such person and his heirs, shall or may after the said twenty years be expired, bring such action or make such entry as he or they might have done before the expiration of the said twenty years, so as such person within ten years after such disability removed, or the heir or heirs of such person within ten years after his death, sue forth such writ or make such entry, and at no time after ten years as aforesaid.

"IV. *And be it further enacted*, That any disseisor dying seised of any lands, tenements or hereditaments, having no right or title therein, shall not be taken or deemed any such descent in the law as to toll or take away the entry of any person or his heirs, who at the time of such descent shall have lawful right of entry therein, unless such disseisor shall have had the peaceable possession of the lands, tenements or hereditaments whereof he shall so die seised for the space of five years next after the dis-

"seizin by him committed, without entry or continual claim by or  
"of the person or persons having lawful title thereto.

"V. *And be it further enacted*, That all actions upon the case  
"and of account, other than actions for slander and actions which  
"concern the trade of merchandize between merchant and mer-  
"chant, their factors or servants, and all actions of debt for ar-  
"rearages of rent, or founded upon any contract without specialty,  
"and all actions of trespass, detinue and replevin for goods or  
"chattels, and actions of trespass *quare clausum fregit*, shall be  
"commenced and sued within six years next after the cause of  
"such actions accrued, and not after; and all actions for assault,  
"battery, wounding and imprisonment, or any of them, shall be  
"commenced and sued within four years next after the cause of  
"such actions accrued, and not after; and all actions on the case  
"for words within two years after the words spoken, and not after;  
"*Provided however*, That if in any of the said actions judgment  
"shall be given for the plaintiff, and the same be reversed by er-  
"ror, or if a verdict pass for the plaintiff and upon matter alleged  
"in arrest of judgment the judgment be given against the plaintiff  
"that he take nothing by his plaint, writ or bill, or if any of the  
"said actions shall be brought by original and the defendant there-  
"in be outlawed and shall after reverse the outlawry, in all such  
"cases the party plaintiff, his heirs, executors, or administrators,  
"as the case shall require, may commence a new action from time  
"to time within one year next after such judgment reversed, or  
"such judgment given against the plaintiff, or outlawry reversed,  
"and not after; *And provided also*, That if any person entitled  
"to any of the said actions, shall at the time of the cause of ac-  
"tion accrued be within the age of twenty-one years, *feme covert*,  
"insane or imprisoned, such person shall be at liberty to bring the  
"said actions within the respective times above limited after such  
"disability removed; and if any person against whom any cause  
"of any such action shall accrue, shall be out of this state at the  
"time the same shall accrue, the person who shall be entitled to  
"such action shall be at liberty to bring the same within the times  
"respectively above limited after the return of the person so ab-  
"sent into this state.

"VI. *And be it further enacted*, That all actions, informations  
"and indictments which at any time hereafter shall be brought,  
"sued or exhibited for any forfeiture upon any penal statute, made  
"or to be made, whereby the forfeiture is or shall be limited to the  
"people of this state only, shall be brought sued or exhibited  
"within two years next after the offence committed or to be com-  
"mitted against such penal act, and not after; and that all actions  
"or informations which shall at any time hereafter be brought, su-  
"ed or exhibited for any forfeiture upon any penal statute, made  
"or to be made, the benefit and suit whereof is or shall be by the  
"said statute limited or given to any person who shall prosecute

"for the same, or to the people of this state and to any other who  
 "shall prosecute in that behalf, shall be brought, sued or exhibited  
 "by any person who may lawfully pursue for the same, within one  
 "year next after the offence committed or to be committed against  
 "the said statute; and in default of such pursuit that then the same  
 "shall be sued, brought or exhibited for the people of this state  
 "at any time within two years after that year ended; and that all  
 "actions or informations which shall at any time hereafter be  
 "brought, sued or exhibited for any forfeiture or cause upon any  
 "statute, made or to be made, the benefit and suit whereof is or  
 "shall be given or limited to the party aggrieved, shall be brought,  
 "sued or exhibited within the space of three years next after the  
 "offence committed or to be committed, or cause of action accru-  
 "ed, and not after; and if any action, information or indictment for  
 "any offence against any statute, made or to be made, shall be  
 "brought after the time in that behalf above limited, the same shall  
 "be void; *Provided always*, That where any action, information,  
 "indictment or other suit is or shall be limited by any statute to be  
 "sued, brought or exhibited within a shorter time than is hereby  
 "limited, then the same shall be brought within the time limited  
 "by such statute.

"VII. *And be it further enacted*, That all suits, informations  
 "and indictments which shall hereafter be brought or exhibited  
 "for any crime or misdemeanor, murder excepted, shall be  
 "brought or exhibited within three years next after the offence  
 "shall have been committed, and not after, and if brought or ex-  
 "hibited after the time hereby limited the same shall be void;  
 "*Provided however*, That if the person, against whom such suit,  
 "information or indictment shall be brought or exhibited, shall not  
 "have been an inhabitant or usually resident within this state  
 "during the said three years, then the same shall or may be  
 "brought or exhibited against such person at any time within  
 "three years, during which he shall be an inhabitant or usually  
 "resident within this state, after the offence committed; *And pro-*  
 "*vided also*, That where any suit, information or indictment for  
 "any crime or misdemeanor is limited by any statute to be brought  
 "or exhibited within a shorter time than is hereby limited, then the  
 "same shall be brought within the time limited by such statute.

"VIII. *And be it further enacted*, That no part of the time  
 "from the fourteenth day of October, in the year one thousand  
 "seven hundred and seventy-five, to the twenty-first day of March,  
 "one thousand seven hundred and eighty three, shall be deemed  
 "or adjudged as part of the respective periods herein before limi-  
 "ted for making any title, prescription, cognizance or claim, or  
 "bringing any action or suit whatsoever."

The above act is retained *verbatim*, in the Revised Laws of  
 1813, (*Van Ness & Woodworth's Revision*, Vol. 1 page 184.

By the 12th section of the act of 36th session, ch. 119, entitled



"an ACT concerning Quit Rents," passed April 12th, 1813. (*Van Ness & Woodworth's Ed. 2 Vol. p. 180.*) it is enacted, "That the act, entitled an "act for the limitation of criminal prosecutions and of actions at law," shall not take effect or be in force as to quit-rents, or any proceeding for the recovery of the arrears thereof, until the first day of January, which will be in the year of our Lord one thousand eight hundred and twenty."

The 4th Section of the Act of 36th Session, Ch. 80, entitled "*An ACT concerning Lands in the Military Tract.*" Passed April 8, 1813. (*Van Ness & Woodworth's Ed. Vol. 1. page 304.*) is in the following words:

"IV. And be it further enacted, That in all cases where any of the said lands shall be settled in manner aforesaid,\* 1783, the person or persons claiming any title thereto, or any part thereof, shall commence an action for the recovery thereof before the first day of January, one thousand eight hundred and twenty-three, and prosecute the same to effect without wilful delay, or be forever thereafter barred from recovering the same: *Provided always*, That if any person or persons claiming such title, be feme covert, under age, or insane, on the said first day of January, one thousand eight hundred and twenty-three, such person or persons shall be permitted to bring such action within five years after such disabilities shall be removed."

By the 28th Section of the Act of 36th Session, Ch. 67, entitled "*An ACT concerning Sheriffs and their duty, in respect to Process, Arrests and the keeping of Prisoners.*" Passed April 6th, 1813. (1 R. L. 427. *Van Ness & Woodworth's Ed.*) it is enacted "That no action shall be brought or maintained against any sheriff, coroner, or other officer, for the escape of any person, imprisoned on civil process, unless the same be brought within one year from the time of such escape."

Actions of debt founded on the Act of 10th Session, Ch. 13, entitled "*An ACT for preventing Usury.*" Passed 8th February, 1787. *Greenleaf's Ed. Vol. 1, page 64. Kent & Radcliff's Ed. Vol. 1 page 57. Van Ness & Woodworth's Ed. Vol. 1, page 64.*) if brought by the party aggrieved, are limited to one year after payment of the usury; and if the party aggrieved "shall not, within the time aforesaid, really and bona fide, and without collusion, commence his, her or their suit or action," "or shall suffer such suit or action to be delayed or discontinued, then it shall be lawful for any other person or persons, within

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\* Where any person or persons under colour of a bona fide purchase by him or them made, shall have actually settled on any lands "granted by letters patent, to officers and soldiers serving in the line of this state in the army of the United States, in the late war with Great Britain, and who died previous to the 27th day of March, 1788."

"one year after such neglect, discontinuance or delay," to bring suit.

Actions of debt founded on the Act of 24th Session, Ch. 46, entitled "*An ACT to prevent excessive and deceitful Gaming.*" Passed 21st March, 1801. (*Kent & Radcliff's Ed. Vol. 1, page 231. Van Ness & Woodworth's Ed. Vol. 1, page 153,*) are limited, if brought by the party aggrieved, to three months next after payment of the bet; and in case the party aggrieved, "shall not within the time aforesaid, *bona fide*, and without collusion, sue and prosecute with effect," "it shall be lawful for any person by any such action, to sue for and recover the same, and treble the amount thereof with costs of suit against such winner." (*Section 2.*)

And suits founded on the Act of 25th Session, Ch. 44, entitled "*An ACT to prevent Horse-Racing, and for other purposes therein mentioned.*" Passed March 19th, 1802, (*Van Ness & Woodworth's Ed. Vol. 1, page 222, 223,*) are by the 5th Section thereof, limited in the same manner.

Prosecutions for offences against the Act of 36th Session, Ch. 24, entitled "*An ACT for suppressing Immorality.*" Passed March 5th, 1813, (*Van Ness & Woodworth's Ed. Vol. 2, page 193. 197,*) are by the 12th Section thereof, limited to "twenty days next after the offence committed."

The 25th Section of the Act of 36th Session, Ch. 203, entitled "*An ACT for the payment of certain Officers of Government, and for other purposes,*" Passed, April 13th, 1813, (*Van Ness & Woodworth's Ed. Vol. 2, page 137,*) enacts, "That all suits or actions on any bond executed by any constable and his sureties for the faithful performance of the duty of his office, shall be prosecuted within two years after the expiration of the year for which such constable shall be elected."

The above are the statutory limitations now in force in the State of New-York: but, on the first day of January, 1830, the "*Revised Statutes of the State of New-York,*" will go into operation. With the exception of the first volume, they are not yet published; but, by the kindness of Benjamin F. Butler, Esqr. one of the gentlemen to whom was entrusted the arduous task of performing that important work, the Editor of this Treatise is enabled to lay before his readers all those parts of that revision, which in any wise relate to the limitations of actions at Law or in Equity. They will be found in the pages immediately following

## TITLE 2. REVISED STATUTES OF THE STATE OF NEW-YORK.

CHAP. IV.  
TITLE II.

## OF THE TIME OF COMMENCING ACTIONS.

- ART. 1.—Of the time of commencing actions relating to real property.  
 ART. 2.—Of the time of commencing actions for the recovery of any debt or demand, or for damages only.  
 ART. 3.—Of the time of commencing actions for penalties and forfeitures.  
 ART. 4.—General provisions concerning the commencement of suits, and the persons and cases excepted from the operation of the preceding Articles of this Title.  
 ART. 5.—Of the presumption of payment arising from the lapse of time.  
 ART. 6.—Of the time of commencing suits in courts of equity.

## ARTICLE FIRST.

*Of the Time of commencing Actions relating to Real Property.*

- SEC. 1. Limitations of certain suits by the people.  
 2. Last section not to extend to suits for franchises, &c.  
 3. Grantees of lands by patents, when to sue.  
 4. Suits when to be brought after patents declared void.  
 5. Limitation of private suits for real property.  
 6. Also of avowries and cognizances.  
 7. What necessary to render entry on lands a claim.  
 8. Owner of land deemed to be possessed unless adverse possession, &c.  
 9. What premises deemed adversely held under written title.  
 10. Acts which in such case, constitute adverse possession.  
 11. What premises deemed adversely held without claim of title.  
 12. Acts which in such case constitute adverse possession.  
 13. Possession of tenant when to be that of landlord.  
 14. Limitation of scire facias on former fines.  
 15. Casting of descent not to affect right to land.  
 16. Exceptions of persons under certain disabilities.  
 17. Effect of death of person under disability.

Suits relating to real estate by the people.

§ 1. The people of this state will not sue or implead any person for, or in respect to, any lands, tenements or hereditaments, or for the issues or profits thereof, by reason of any right or title of the said people to the same, unless,

1. Such right or title shall have accrued within twenty years before any suit, or other proceeding, for the same shall be commenced: or unless,

2. The said people, or those from whom they claim, shall have received the rents and profits of such real estate, or of some part thereof, within the said space of twenty years.<sup>2</sup>

Last section qualified.

§ 2. The last preceding section shall not extend to any suit or prosecution for, or in respect to, any liberties or franchises.<sup>2</sup>

§ 3. No action shall be brought for, or in respect to, any lands, tenements or hereditaments, by any person claiming by virtue of any letters patent, or grants from the people of this state, unless the same might have been commenced by the people of this state, as herein specified, in case such patent or grant had not been issued or made.<sup>2</sup> ART. 1.  
Grantees of  
the state.

§ 4. When letters patent, or grants, of any lands or tenements, shall have been issued or made by the people of this state, and the same shall be declared void by the judgment or decree of some competent court, rendered upon a suggestion of concealment, or wrongful detaining, or defective title, in such case, an action for the recovery of the premises so conveyed, may be brought, either by the people of this state, or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after such judgment or decree was rendered; but not after that period.<sup>2</sup> Suits after  
patents de-  
clared void.

§ 5. No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the premises in question, within twenty years before the commencement of such action.<sup>3</sup> Private suits  
for real pro-  
perty.

§ 6. No avowry or cognizance of title to real estate, or to any rents or services, shall be valid, unless it appear that the person making the avowry, or the person in whose right the cognizance is made, or the ancestor, predecessor or grantor of such person, was seised or possessed of the premises in question, within twenty years before the committing the act, in defence of which such avowry or cognizance is made.<sup>3</sup> Avowries  
and cogni-  
zances.

§ 7. No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry and within twenty years from the time when the right to make such entry, descended or accrued.<sup>4</sup> Entry on  
land, when  
valid.

§ 8. In every action for the recovery of real estate, or the possession thereof, the person establishing a legal title to the premises, shall be presumed to have been possessed thereof, within the time required by law; and the occupation of such premises by any other person, shall be deemed to have been under, and in subordination to, the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for twenty years before the commencement of such action. Owner of  
land deemed  
possessed.

(2) 1 R. L. p. 184, § 1. (3) Ib. § 2. (4) Ib. § 3.

## TITLE 2

Adverse  
possession  
under writ-  
ten title.

§ 9. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of some competent court; and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included, shall be deemed to have been held adversely; except that where the premises so included, consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

Ib. What  
acts to con-  
stitute it.

§ 10. For the purpose of constituting an adverse possession, by any person claiming a title founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved:
2. Where it has been protected by a substantial enclosure:
3. Where, although not enclosed, it has been used for the supply of fuel, or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant:
4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time, as the part improved and cultivated.

Ib. Without  
claim of title

§ 11. Where it shall appear that there has been an actual continued occupation of any premises, under a claim of title, exclusive of any other right, but not founded upon any written instrument, or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

Ib. What  
acts to con-  
stitute.

§ 12. For the purpose of constituting an adverse possession, by a person claiming title not founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied, in the following cases only:

1. Where it has been protected by a substantial enclosure:
2. Where it has been usually cultivated or improved:

Possession  
by tenant.

§ 13. Whenever the relation of landlord and tenant, shall have existed between any persons, the possession of the tenant shall be deemed the possession of the

landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent; notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after the periods herein limited. ART. 1.

§ 14. All writs of *scire facias* upon fines, heretofore levied of any manors, lands, tenements or hereditaments, shall be sued out within twenty years next after the title and cause of action first descended or fallen; and not after that period.<sup>5</sup> Seire facias on fines.

§ 15. The right of any person, to the possession of any real estate, shall not be impaired or affected, by a descent being cast in consequence of the death of any person in possession of such estate.<sup>6</sup> Descent cast.

§ 16. If any person entitled to commence any action in this Article specified, or to make any entry, avowry or cognizance, be at the time such title shall first descend or accrue, either, Exceptions for certain disabilities.

1. Within the age of twenty-one years: or,
2. Insane: or,
3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life: or,
4. A married woman:

The time during which such disability shall continue, shall not be deemed any portion of the time in this Article limited for the commencement of such suit, or the making such entry, avowry or cognizance: but such person may bring such action, or make such entry, avowry or cognizance, after the said time so limited, and within ten years after such disability removed, but not after that period.<sup>7</sup> Limitation.

§ 17. If the person entitled to commence such action, or to make such entry, avowry or cognizance, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of the title, right or action to him accrued, his heirs may commence such action, or make such entry, avowry or cognizance, after the time in this Article limited for that purpose, and within ten years after his death; but not after that period.<sup>7</sup> Death of persons under disability.

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(5) 1 R. L. p. 184, § 3. (6) Ib. § 4. (7) Ib. § 2, 3 and 5.

## TITLE 2.

## ARTICLE SECOND.

*Of the time of commencing Actions for the Recovery of any Debt or Demand, or for Damages only.*

- SEC. 18. Certain actions to be brought within six years.  
 19. Others to be brought within four years.  
 20. Others to be brought within two years.  
 21. Against sheriffs, &c. for escapes, to be brought in one year.  
 22. All others against sheriffs, &c. to be brought in three years.  
 23. When cause of action deemed to have accrued in certain cases.  
 24. Exception of persons under certain disabilities.  
 25. Exception of suits on notes, &c. of corporations.  
 26. Suits by executors, &c. when to be brought in certain cases.  
 27. Exception of suits against persons being out of state.  
 28. Suits by the people, subject to this article.

Actions  
which are to  
be brought  
within six  
years.

§ 18. The following actions shall be commenced within six years next after the cause of such action accrued, and not after :

1. All actions of debt founded upon any contract, obligation or liability, not under seal, excepting such as are brought upon the judgment or decree of some court of record of the United States, or of this or some other state :
2. All actions upon judgments rendered in any court not being a court of record :
3. All actions of debt for arrearages of rent not reserved by some instrument under seal :
4. All actions of account, assumpsit, or on the case, founded on any contract or liability, express or implied :
5. All actions for trespass upon land :
6. All actions for taking, detaining or injuring any goods or chattels, including actions of replevin :
7. All special actions on the case for criminal conversation, for libels, or for any other injury to the persons or rights of any, except such as are specified in the two next sections.<sup>8</sup>

Others to be  
brought  
within four  
years.

§ 19. The following actions shall be commenced within four years after the cause of action accrued, and not after :

1. All actions for assault and battery :
2. All actions for false imprisonment.<sup>9</sup>

Others to be  
brought  
within two  
years.

§ 20. The following actions shall be commenced within two years after the cause of action accrued, and not after :

1. Actions for words spoken, slandering the character or title of any person :
2. Actions for words spoken, whereby special damages are sustained :<sup>8</sup>

Against  
sheriffs, &c.  
for escapes.

§ 21. All actions against sheriffs or other officers, for the escape of persons imprisoned on civil process, shall

(8) 1 R. L. p. 136, §5.

be commenced within one year from the time of such escape, and not after.<sup>9</sup> ART. 2.

§ 22. All actions against sheriffs and coroners, upon any liability incurred by them, by the doing any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period. All others' actions against sheriffs, &c.

§ 23. In all actions of debt, account or assumpsit, brought to recover any balance due upon a mutual, open and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account. Course of action in certain cases.

§ 24. If any person entitled to bring any action in this Article specified, (excepting actions against sheriffs or other officers for escapes,) shall, at the time the cause of action accrued, be, either, Exceptions for certain disabilities.

1. Within the age of twenty-one years : or,
2. Insane : or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for his natural life : or,
4. A married woman :

Such person shall be at liberty to bring such actions within the respective times in this article limited, after such disability removed.<sup>10</sup>

§ 25. None of the provisions of this Article, shall apply to suits brought to enforce payment on bills, notes or other evidences of debt, issued by monied corporations. Suits on notes &c. of corporations.

§ 26. If any person entitled to bring any action in this Article specified, shall die before the expiration of the time herein limited for the commencement of such suit, if such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time, and within one year after such death, commence such action ; but not after that period. By executors, &c. in certain cases.

§ 27. If at the time when any cause of action specified in this Article, shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited, after the return of such person into this state ; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part Against persons out of the state.

(9) Ib. p. 427, §26. (10) 1 R. L. p. 186. §5.



**TITLE 2.** of the time limited for the commencement of such action.<sup>10</sup>

Suits by the people.

§ 28. The limitations in this Article prescribed, for the commencement of actions, shall apply to the same actions, when brought in the name of the people of this state, or in the name of any public officer, or otherwise, for the benefit of the said people, in the same manner as to actions brought by citizens.

### ARTICLE THIRD.

#### *Of the Time of commencing Actions for Penalties and Forfeitures.*

SEC. 29. Penalties to the people to be sued for in two years.

30. Penalties wholly or partly to an informer.

31. Penalties wholly or partly to party aggrieved.

Penalties to the people.

§ 29. All actions upon any statute made, or to be made, for any forfeiture or penalty, to the people of this state, shall be commenced within two years after the offence shall have been committed, and not after.<sup>11</sup>

Wholly or partly to informers.

§ 30. All actions upon any statute made, or to be made, for any forfeiture or penalty, given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the offence shall have been committed, and not after: and in case such action be not commenced within that time, by any private citizen, then the same shall be commenced within two years after that year ended, in behalf of the people of this state, by the attorney-general, or the district attorney of the county where the offence was committed; and not after.<sup>12</sup>

Penalties wholly or partly to party aggrieved.

§ 31. All actions upon any statute made, or to be made, for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this state, shall be commenced within three years after the offence committed, or the cause of action accrued, and not after.<sup>12</sup>

### ARTICLE FOURTH.

#### *General Provisions concerning the Commencement of Suits, and the Persons and Cases excepted from the Operation of the preceding Articles of this Title.*

SEC. 32. In suits by aliens, time of war to be deducted.

33. Provision when judgment has been arrested or reversed.

34. Also, when defendant dies after suit brought.

35. Also, when plaintiff dies after suit brought.

36. Also, when bringing suit stayed by injunction.

37. Also, when prevented by privilege of defendant.

38. When actions deemed to have been commenced.

39. Matters of defence as to commencement of suits.

40. When process not to be deemed commencement of suit.

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(10) 1 R. L. p. 186, §5. (11) Ib. §6. (12) 1 R. L. p. 186, §6.

41. When disabilities must have existed.

42. Provision as to two or more concurrent disabilities.

43. This Title not to apply where shorter limitations.

44. This chapter not to apply to suits for certain penalties, &c.

45. Rights of action existing, &c. excepted from this Title.

ART. 4.

§ 32. Whenever any person shall be disabled to prosecute in the courts of this state, by reason of his being an alien subject or citizen, of any country at war with the United States, the time of the continuance of such war, shall not be deemed any part of the respective periods limited in the first and second Articles of this Title, for the making of any entry, or the commencement of any action.

§ 33. If any action shall have been commenced within the times respectively prescribed in the three first Articles of this Title, and judgment be given therein for the plaintiff, and the same be arrested or reversed on error, the plaintiff may commence a new action, from time to time, within one year after such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may in like manner commence a new action, within the time herein allowed to such plaintiff.<sup>13</sup>

§ 34. If any action shall have been commenced within the times respectively prescribed in the three first Articles of this Title, and the defendant in such suit die before judgment; and if the right of action be such as survives against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors or administrators of such defendant, as the case may require, within one year after such death; or, if no executors or administrators be appointed within that time, then within one year after letters testamentary, or of administration, shall have been granted to them.

§ 35. When an action commenced within the time prescribed by law, shall abate by reason of the death of the plaintiff, if the right of action survive to his representatives, his executor or administrator may, within one year after such death, commence a new action, if the cause of such action would otherwise survive; and if any action so commenced by an executor or administrator, shall abate by the death of the plaintiff, a new action may be commenced by the administrator of the same estate, at any time within one year after such abatement.

§ 36. Whenever the commencement of any suit shall be prevented by in-

(18) Ib. §5.

**TITLE 2.** be stayed by an injunction of any court of equity, the time during which such injunction shall be in force, shall not be deemed any portion of the time in this Chapter limited, for the commencement of such suit.

**Ib. by privilege.**

§ 37. Whenever the commencement of any suit shall be prevented, by reason of any privilege of any member of either house of the legislature of this state, or of any member of either house of the congress of the United States, the time during which the same shall have been so prevented, shall not be deemed any portion of the time limited for the commencement of any suit for the recovery of any debt, demand, or damages only.<sup>14</sup>

**Commencement of actions.**

§ 38. No action for the recovery of any debt, demand, or damages only, or for the recovery of any penalty or forfeiture, shall be deemed to have been commenced within the meaning of this Chapter, unless it appear,

1. That the first process or proceeding therein was duly served upon the defendants, or some one of them : or,

2. That a *capias ad respondendum* was issued within the time required by law, to the sheriff of the county in which the defendants, or one of them, usually resided, or last resided, in good faith, and with intent to be actually served ; and that such writ was duly returned :

3. If a corporation be defendant, that the first process was in like manner issued to the sheriff of the county, in which such corporation was located by law, or in which the place of transacting its business was situated, with the intent to be actually served ; and that such process was duly returned.

**What defendant may prove.**

§ 39. When a suit shall be alleged by a plaintiff to have commenced within the time required by law, and such allegation shall be put in issue by the defendant, it shall be competent for the defendant to prove, on the trial, that the process issued by the plaintiff, was not issued with the intent, or in the manner required by law ; or that it was issued to the sheriff of one county, when the plaintiff knew, or had reason to believe, that the defendant was in another county, and could have been arrested ; or that any means whatever were used by the plaintiff, or his attorney, to prevent the service of the writ, or to keep the defendant in ignorance of the issuing thereof.

**What process not effectual, &c.**

§ 40. Upon any such matter being established, or upon its appearing in any other way, that any process was issued without any intent that it should be served,

(14) 1 R. L. p. 122, §2.

such process shall not be deemed the commencement of a suit, within the meaning of any of the provisions of this Chapter. ART. 5.

§ 41. No person shall avail himself of any disability enumerated in this Title, unless such disability existed at the time his right of action, or of entry, accrued. Disabilities.

§ 42. Where there shall be two or more such disabilities existing at the time the right of action or of entry accrued, the limitations herein prescribed shall not attach, until all such disabilities be removed. Two or more disabilities.

§ 43. The provisions of this Title shall not extend to any action which is or shall be limited by any statute, to be brought within a shorter time, than is herein prescribed; but such action shall be brought within the time limited by such statute. Limitations by other statutes.

§ 44. None of the provisions of this Chapter shall apply to suits against directors or stockholders of any monied corporations, to recover any penalty or forfeiture imposed, or to enforce any liability created, by the second Title of the eighteenth Chapter of the First Part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created. Certain suits for penalties, &c. excepted.

§ 45. The provisions of the preceding Articles of this Title, shall not apply to any actions commenced, nor to any cases where the right of action shall have accrued, or the right of entry shall exist, before the time when this Chapter takes effect as a law; but the same shall remain subject to the laws now in force. Existing rights of action, &c.

#### ARTICLE FIFTH.

##### *Of the Presumption of payment arising from the Lapse of Time.*

Sec. 46. Certain former judgments, when presumed paid.

47. Future judgments when to be deemed satisfied.

48. Sealed instruments when to be deemed paid.

§ 46. The presumption of payment shall apply to all judgments of a court of record in this state, rendered before the third day of April, one thousand eight hundred and twenty one, and to all such judgments rendered before this Chapter shall take effect as a law, in the same manner as such presumption applies to sealed instruments. Certain former judgments.

§ 47. Every judgment and decree hereafter rendered in any court of this state, or of the United States, or of Future judgments.

**TITLE 2.** any other state or territory within the United States, shall be presumed to be paid and satisfied, after the expiration of twenty years from the time of the signing and filing such judgment or decree; but in any suit at law or in equity, in which the party against whom such judgment or decree was rendered, or his heirs or personal representatives, shall be a party, such presumption may be repelled by proof of payment, or of written acknowledgment of indebtedness, made within twenty years, of some part of the amount recovered by such judgment or decree; in all other cases, it shall be conclusive.

**Sealed instruments.**

§ 48. After the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument, for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period.

#### ARTICLE SIXTH.

##### *Of the Time of commencing Suits in Courts of Equity.*

Sec. 49. Certain limitations at law, to apply to chancery.

50. Not to extend to cases of exclusive equity jurisdiction.

51. Bills for relief from fraud, to be filed in six years.

52. All other bills to be filed in ten years.

53. Exceptions of persons under disabilities.

**Concurrent jurisdiction.**

§ 49. Whenever there is a concurrent jurisdiction in the courts of common law, and in courts of equity, of any cause of action, the provisions of this Title limiting a time for the commencement of a suit for such cause of action, in a court of common law, shall apply to all suits hereafter to be brought for the same cause, in the court of chancery.

**Last section qualified.**

§ 50. But the last section shall not extend to suits over the subject matter of which, a court of equity has peculiar and exclusive jurisdiction, and which subject matter is not cognizable in the courts of common law.

**Relief from fraud.**

§ 51. Bills for relief, on the ground of fraud, shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time.

**All other bills.**

§ 52. Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after.

**Exceptions of persons under disabilities.**

§ 53. But if the person entitled to file any bill specified in the two last sections, be at the time of discovering the facts constituting such fraud, or at the time the

cause for filing such bill shall accrue, under any of the disabilities in the first and second Articles of this Title enumerated, the time during which such disability shall continue, shall be excepted from the limitations contained in the two last sections, in the same manner and with the like effect, as such time is herein excepted from the limitations prescribed for commencing actions at law; and in case of the death of the person so entitled, during such disability, or before the expiration of the time herein limited for filing such bills, the same may be filed by the heirs or representatives of such person, as the case may require, within the same time as allowed in the said first and second Articles for commencing actions at law in the like cases.

ART. 1.

## PART III, CHAP. IX, TITLE 3.

§ 21. All writs of error upon any judgment or final determination, rendered in any cause, in any court of law and of record in this state, shall be brought within two years after the rendering of such judgment or final determination, and not after; except in the cases specified in the two next sections.<sup>25</sup>

§ 22. If any person against whom such judgment or determination shall be made, shall be at the time, either,

1. Within the age of twenty-one years: or,
2. Insane: or,
3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than for life: or,
4. A married woman.

The time during which such disability shall continue, shall not be deemed any portion of the time above limited for bringing a writ of error; but such person may bring such writ after the time so limited, and within two years after such disability removed.

§ 23. If the person entitled to bring such writ, shall die, during the continuance of any disability specified in the preceding section, his heirs, devisees, executors or administrators, entitled by law to prosecute such writ, may bring the same, after the time herein limited for that purpose, and within two years after such death.

§ 24. But the existence of any disability specified in the preceding sections, shall not authorise the bringing of a writ of error upon any judgment, after the expiration of five years from the time of rendering the same.

**TITLE 2** § 67. Whenever a petition shall be presented by any person against whom proceedings shall have been instituted as an absent, absconding or concealed debtor, or by any person to whom such debtor shall have assigned or delivered any property or made any payments, in the cases provided in the first Article of the first Title of the fifth Chapter of the Second Part of the Revised Statutes, for the purpose of procuring the discharge of any warrant issued against such debtor, and such petition shall have been referred to any court, for its determination thereon, or for trial by jury, such decision, when made by a court of common pleas, or the verdict of a jury, when rendered in a court of common pleas, may be examined by the supreme court, upon a *certiorari*, to be allowed by one of the justices thereof; and when made by the supreme court, shall be subject to a writ of error, as in other cases.

Removing  
decisions  
under ab-  
sconding  
debtor acts.

§ 68. Such *certiorari* and such writ of error, shall be brought and filed in the office of a clerk of the court by which the decision was made, or in which the verdict was rendered, within thirty days after such decision or verdict; during which time, the order and judgment of the court shall be suspended, and the property seized by virtue of any such warrant, and any bonds or other securities taken according to law, in relation to such property, shall remain in the hands of the officer holding such warrant.

Order sus-  
pended; fil-  
ing certio-  
rari.

§ 78. All appeals from final decrees of the court of chancery, shall be made within the same time after the enrolment of any such decree, as herein prescribed for bringing writs of error upon judgments at law, subject to the same exceptions and provisions in favor of persons under disability at the time of rendering such decree, and subject to the same restrictions, except where provision is otherwise specially made by law.<sup>32</sup>

When ap-  
peals from  
final decrees  
to be made.

§ 79. All appeals from any other order or decree of the court of chancery, including decrees for the general costs of the cause, shall be made within fifteen days after notice thereof shall have been given to the party against whom such order or decree shall be made, or to his solicitor.

Ib. from  
other orders  
and decrees.

§ 90. Appeals from the decisions of surrogates, by which any will of real estate shall have been admitted to record, or any will of personal estate shall have been admitted to probate; or by which any such will shall be refused to be admitted to record or probate, to the circuit judge of the circuit, shall be made within three

Appeals  
from surro-  
gates.

months after such decision made and entered, in the manner and with the security specified in the first Title of the sixth Chapter of the Second Part of the Revised Statutes. TITLE 2.

§ 100. An appeal to the court of chancery may be entered from the decision of any circuit judge, upon such appeal from a surrogate, when no feigned issue shall have been awarded for the trial of any question of fact, within one month from the time such decision shall have been certified to the surrogate, and entered in his office. Appeal to  
chancellor.

§ 104. Appeals may be made from the orders, decrees and sentences of surrogates, in all cases, to the court of chancery, except where provision has been herein made for appeals to circuit judges, and except appeals from orders concerning any admeasurement of dower.<sup>33</sup> Appeals to  
chancellor.

§ 105. Such appeals from the decree of a surrogate, for the final settlement of the account of any executor, administrator or guardian, shall be made within three months after such decree shall have been recorded. From de-  
crees set-  
tling ac-  
counts.

§ 106. Such appeals from the order of a surrogate for the appointment of a guardian, or for his removal; or upon a refusal to make such removal; shall be made within six months after such order shall have been entered. From order  
appointing  
&c. guardi-  
an.

§ 107. In all other cases not herein before specified, and not otherwise limited by law, appeals from the orders, decrees and sentences of surrogates, to the court of chancery, shall be made within thirty days after such order, decree or sentence shall have been made.<sup>33</sup> When in all  
other cases.

§ 118. Appeals to the supreme court, from the orders of surrogates and the decisions of courts of common pleas, confirming or vacating any admeasurement of dower, shall be made within thirty days after such order or decision made, upon giving a bond as required by law.<sup>34</sup> Appeals  
from deci-  
sions in-  
dower.

§ 119. Appeals to the court of chancery, from the judgments, orders and determinations of the courts of common pleas, made upon any proceedings instituted therein, in relation to the persons and estates of habitual drunkards, must be made within three months after the making such order, determination or judgment, and upon giving the security required by law. Ib. in case  
of drunk-  
ards.

#### PART II, CHAP. I, TITLE 3.

“§ 18. A widow shall demand her dower within twenty years after the death of her husband; but if, at the time of such death,

(33) Laws of 1822, p. 68, § 8.

(34) 1 R. L. p. 61, § 10.



she be under the age of twenty-one years, or insane, or imprisoned on a criminal charge or conviction, the time during which such disability continues, shall not form any part of the said term of twenty years."

PART II, CHAP. IV, TITLE 3.

§ 3. Limits suits by the party aggrieved or his personal representatives to recover back usurious payments, to one year thereafter.

"§ 4. If such suit be not brought within the said one year, and prosecuted with effect, then the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made."

PART I, CHAP. XX, TITLE 8.

"§ 74. No prosecution shall be maintained for any of the violations [*violations of the Sabbath,*] specified in the preceding section, unless the same be instituted by the actual issuing of process to apprehend the offender, or by his actual appearance to answer the complaint, within twenty days next after the offence committed."

PART I, CHAP. XI, TITLE 3.

"§ 23. All actions against a constable or his sureties, upon any such instrument, [*Constable's Bond,*] shall be prosecuted within two years after the expiration of the year for which the constable named therein shall have been elected."

**LIMITATION OF CRIMINAL PROSECUTIONS.**

PART IV, CHAP. II, TITLE 4.

"§ 37. Indictments for murder may be found at any time after the death of the person killed; in all other cases, indictments shall be found and filed in the proper Court, within three years after the commission of the offence; but the time during which the defendant shall not have been an inhabitant of, or usually resident within this state, shall not constitute any part of the said limitation of three years."



A part of the 35th section of the old Constitution of the State of New York, is in the following terms:

"And this convention doth further, in the name and by the authority of the good people of this State, ORDAIN, DECLARE, AND DECLARE, That such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New-York, as together did form the law of the said colony on the nineteenth day of April, in the year of our Lord,

"one thousand seven hundred and seventy-five, shall be and continue the law of this state; subject to such alterations and provisions as the legislature of this state shall, from time to time make concerning the same. That such of the said acts as are temporary, shall expire at the times limited for their duration respectively." "And this convention doth further ordain, that the resolves or resolutions of the congresses of the colony of New-York, and of the convention of the state of New-York, now in force, and not repugnant to the government established by this constitution, shall be considered as making part of the laws of this state; subject, nevertheless, to such alterations and provisions, as the legislature of this state may from time to time make, concerning the same."

And the 13th Section of Article seventh, of the *amended Constitution* of the same state, is as follows:

"SEC. XIII. Such parts of the common law, and of the acts of the legislature of the colony of New-York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the said colony, and of the convention of the state of New-York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed, or altered; and such acts of the legislature of this state, as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts or parts thereof, as are repugnant to this constitution, are hereby abrogated."

Previous to the passage of the Act of 26th February, 1788, before mentioned,<sup>[1]</sup> no Statute of Limitations had been passed by the Legislature of the State of New York, nor any restrictions put upon the bringing of suits, excepting only, the limitation of the time for bringing writs of Error and Appeals,<sup>[2]</sup> and suits for offences against the *Habeas Corpus* Act.<sup>[3]</sup> And since by the *Common Law*, there was no limitation of time as to the bringing of actions,<sup>[4]</sup> there could not, prior to that period, have been any limitation of suits, &c. further than they might be affected by "the Acts of the Legislature of the Colony," or such parts "of the Statute Law of England and Great Britain," as were by the above Sections of the Constitution declared to be law. The following are the only enactments on this subject, by the *Colonial Legislature*:

#### LAWS OF THE COLONY OF NEW-YORK.

"The First Assembly, Held in the third year of the Reign of

[1] Vide Ante, page 472. [2] Vide Ante, page 474. [3] Vide Ante, page 476.  
[4] Vide Ante, page 3, note (1).

KING WILLIAM and QUEEN MARY, Begun the 9th of April, 1691.

FIRST SESSIONS.

HENRY SLOUGHTER, Esq.; Governor."

"3d WM. and MARY, A. D. 1691. CHAP. II.

"An ACT for Settling, Quieting and Confirming unto the  
"Cities, Towns, Manors and Freeholders within this Province,  
"their several Grants, Patents and Rights respectively.

Pass'd the 6th of May, 1691.(a)

"Preamble. FORASMUCH as the many Changes, Alterations, and  
"Disturbances, that have been lately given unto Their Majesties  
"Subjects inhabiting within this Their Province, hath and doth  
"very much discourage the Settling, Improving, and the Growth  
"and Strength thereof; and that it is now absolutely necessary,  
"for the quieting and satisfying Their Majesties good Subjects  
"within the same, that the Rights and Privileges formerly held by,  
"and granted to, the respective Cities, Towns, Manors, and Free-  
"holders within this Province, &c. should be now ratified and  
"confirmed :

"I. ~~We~~ it therefore enacted by the Governor, Council, and  
"Representatives convened in General Assembly, and it is here-  
"by Enacted and Declared by the Authority of the same, That  
"all the Charters, Patents, and Grants," &c. "under the seal of  
"this Province," &c. "and registered in the Secretary's Office,"  
"&c. shall be good in Law "notwithstanding of the Want of Form  
"in the Law, or the Non-Feizance of any Right, Privilege, or Cus-  
"tom, which ought to have been done heretofore by the Constitu-  
"tions and Directions contained in the respective Charters, Patents,  
"and Grants aforesaid."

By Sect. 2, All Charters, Patents, and Grants heretofore made,  
as aforesaid, are confirmed. "Provided, That nothing herein  
"contained, shall be construed or taken, to bar any Person or Per-  
"sons, of his or their former and just Right or Pretences to any  
"House, Tract, or Parcel of Land within this Province: *Always*  
"Provided, That he or they that have any such just Right or  
"Pretence do make his or their Claim within the Space of Five  
"Years next after the Date hereof. *And also provided*, That  
"nothing herein contained shall be intended, or construed to the  
"Prejudice or Hindrance of the Title or claim of any person un-  
"der Age, Feme Covert, *Non Compos Mentis*, Imprisonment, or  
"beyond the Seas."

9th ANNE, A. D. 1710.

ROBERT HUNTER, Esq.; Governor.

Act of 30th October, 1710. CHAP. 216.(b)

(a) *Laws of Colony of New-York, Van Schaack's Ed. p. 2. Bradford's Ed. Vol. 3, p. 7. Smith & Livingston's Ed. Vol. 1, p. 2.*

(b) *Van Schaack's Ed. p. 62. Bradford's Ed. Vol. 3, p. 77. Smith & Livingston's Ed. Vol. 1 p. 84.*

Sect. 1. *Enacted*, That possession of any lands, &c. from the 30th of October 1700; to the 1st of September, 1713, without Claim by actual Entry, or Suit prosecuted to effect, shall be deemed a good title.

Sect. 2. *Proviso*, This act not to bar suits commenced before the 1st September, 1713, and afterwards prosecuted with effect, nor prejudice *Mortgages*, nor leases recorded.

Sect. 3. "*Provided also*, That neither this Act, nor any Thing therein contained, shall be extended or construed to the Prejudice or Hindrance of any Person or Persons, under the Age of One and twenty Years, married women, not of sound mind, imprisoned or beyond the Seas: *Provided*, such Person or Persons, within Three Years after his or their coming to the Age of One and twenty Years, being unmarried, becoming of sound Mind, Liberty or Return into this Plantation and Colony, do make their actual Entry, or bring their Suit, as aforesaid; otherwise to be utterly debarred, and excluded from any Entry, Claim, Suit or Demand whatsoever."

13th GEORGE III. A. D. 1773.

WILLIAM TRYON Esq.; Governor.

CHAP. MDCX.

"An ACT for the Amendment of the Law, and the better Advancement of Justice." Pass'd the 3th March, 1773.(a)

Sect. "XI. *And be it further enacted by the authority aforesaid*, That all Suits and Actions in the Court of Admiralty for Seamen's Wages, which shall become due, shall be commenced and sued within six Years next after the Cause of such Suit or Suits shall accrue, and not after.

"XII. *Provided nevertheless, And be it further enacted*, That if any Person or Persons, who is or shall be entitled to any such Suit or Action, for Seamen's Wages, be, or shall be, at the Time of any such Cause of Suit or Action, accrued, fallen or come, within the Age of Twenty-one Years, Feme Covert, *non Compos Mentis*, imprisoned, or beyond the Seas; that then such Person or Persons shall be at Liberty to bring the same Actions, so as they take the same within six Years next after their coming to or being of full Age, discover, of sane Memory, at large, and returned from beyond the Seas.

"XIII. *And be it further enacted by the authority aforesaid*, That if any Person or Persons, against whom there is or shall be any such Cause of Suit or Action for Seamen's Wages, or against whom there shall be any Cause of Action of Trespass, Detinue, Action *Sur Trower*, or Replevin, for taking away any Goods or Chattels, or of Action of Account, or upon the Case, or of Debt, grounded upon any lending or Contract without Specialty, or Debt for Arrearages of Rent, or Assault, Menace, Battery,

(a) *Van Schaack's Ed.* p. 767, 768.

" Wounding and Imprisonment, or any of them, be or shall be at the time of any such Cause of Suit or Action given or accrued, fallen or come, beyond the Seas ; that then such Person or Persons, who is or shall be entitled to any such Suit or Action, shall be at Liberty to bring the said Actions against such Person or Persons after their Return from beyond the Seas ; so as they take the same after their Return from beyond the Seas, within such Times as are respectively limited for the bringing of the said Actions before by this Act."

13th GEORGE III. A. D. 1773.

WILLIAM TRYON, Esq. ; Governor.

CHAP. MDCXII.

" *An ACT for giving relief on Promissory Notes.*

Pass'd the 8th March, 1773.(a)

" II. ~~And~~ *be it further enacted by the authority aforesaid*, That all and every such Action upon any such Note already made shall be commenced, sued, and brought within six Years next after the End of this present Session, and not after ; and that all and every such Action, upon any such Note, hereafter to be made, shall be commenced, sued, and brought within six Years next after the Cause of such Action, and not after.

" III. ~~Provided nevertheless~~, *and it is hereby enacted by the authority aforesaid*, That if any Person that is or shall be entitled to any such Action be, or shall be at the Time of such Action accrued, within the Age of one and Twenty Years, Feme Covert, *non Compos Mentis*, imprisoned, or beyond the Seas, that then such Person or Persons shall be at Liberty to bring the same Actions, so as they take the same within such Time as is before limited after their coming to or being of full Age, discover, of sane Memory, at large, and returned from beyond the Seas. as other Persons having no such Impediment should have done."

It appears, then, that unless the " Statute Law of England and Great Britain," on the subject of Limitation of actions at law, were in force in the Colony of New-York, there was, in most cases, no limitation, previous to the act of 26th February 1788.[1] The act of 21 James 1. c. 16, was in force, in the Colony, and consequently in the State, as appears from the following act :

LAWS OF NEW-YORK, SIXTH SESSION.

CHAP. 39.

" *An Act for giving Relief against the Operation of the Statute of the 21st of James the 1st, commonly called the Statute of Limitations ; and of an Act of this State while it was a Colony, entitled, " An Act for giving Relief on promissory Notes.*

Passed 21st March, 1783.(b)

(a) Van Schaack's Ed. page 772. [1] Vide ante page 472. (b) Holt & London's Ed. page 237.

WHEREAS the Disturbances which proceeded, and *Preamble,* have attended the Present happy Revolution have great- *As to the necessity of Relief* ly interrupted the free Course of Justice; and it would be altogether unreasonable, that during this Period the Statute made in the twenty first Year of the Reign of King James the First, entitled, "An Act for Limitation of Actions, and for avoiding of Suits in Law," or the Act of the Legislature of this State, while it was the Colony of New-York, entitled, "An Act for giving relief on Promissory Notes," should operate to the Prejudice of Creditors, or Suitors: *against Statute of 21st year of James the 1st.*

"Be it therefore enacted by the People of the State of New-York, represented in Senate and Assembly, and it is hereby enacted by the Authority of the same, That no part of the time from the fourteenth day of October in the year One Thousand Seven Hundred and Seventy Five to the Day of the passing of this Act shall be deemed, computed, pleaded, or adjudged as Part of the respective Periods, limited by the said recited Statute and Act respectively, for commencing, suing, or prosecuting any of the Writs, Actions, Suits or Plaints, in and by the said Statute and Act respectively specified and described; the said Statute and Act, or any Law, Usage or Custom, or any Plea of the said Statute [Statute] of Limitations or Act, or any Judgment in Favour of any Defendant or Defendants, which are hereby respectively set aside, and vacated, to the Contrary thereof, in any Wise notwithstanding." *Made of Relief.*

It will be perceived that in the above recited act, no notice is taken of the Statute of 32 Henry 8. c. 2., or of any other of the English Statutes of Limitations, except that of 21 James 1. c. 16; it, therefore, throws no light upon the question, whether or not those statutes were in force in the colony. This point was raised on the argument of the cause of *Jackson ex dem. Woodruff & Al. vs. Gilchrist*, (15 Johns. Rep. 89.), and was discussed at large, by the counsel, but left undecided; THOMPSON, CH. J., *delivering the Opinion of the court*, said;

"What part of the common law of England was in force here, before the American Revolution, has been a subject of very considerable doubt and difficulty; (*Smith's Hist. of N. Y.* 372, "381.) and is not now intended to be decided."

And at page 115, he adds;

"But this Article [35th Article of the Constitution of New York] affords a fair inference also, (if it had been thought necessary to enter into that question,) that the whole body of the common law was not considered in force and operation here; otherwise the Article would not have spoken of a part. It adopts such part of the common law, which together with the Statute law, did

then form the law of the colony; and how is this to be ascertained? It must be either by showing an express adoption, or an implied one, to be collected from the course and practice of the courts, and the usages and customs which prevailed in the government."

And in 1 *Bl. Com.* 108, 109, it is said;

"For it hath been held, <sup>(l)</sup> that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, <sup>(m)</sup> are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries." "What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. <sup>(n)</sup> Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject however to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named."

And at page 110, it is also said;

"These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely as the municipal laws of England. Most of them have probably copied the spirit of their own law from this original; but then it receives its obligation, and authoritative force, from being the law of the country."

Each of the English Statutes of Limitations contains an important *Exception*, which is omitted in all the Statutes of Limitations passed by the Legislature of the *State of New York*; (*viz.*) the

(l) *Salk.* 411. 686.

(m) 2 P. Williams, 75.

(n) 7 Rep. 17. *Calvin's case*. Show. Parl. Ca. 31. [See also in the case of *Campbell v. Hall*, *Coop. Rep.* 204. a great and elaborate argument of Lord Mansfield, in delivering the judgment of the Court of King's Bench.]

saving as to persons "*beyond the Seas*." All persons, therefore, in whom any right of action vested, previous to the 26th of February, 1788, would, it is believed, if out of the *State*, at the time such right of action accrued, be entitled to the benefit of this *Exception*.

## NORTH CAROLINA.

(*Act of 1715*.)

Entry or claim into lands, tenements and hereditaments, by persons that shall have right or title thereto, limited to seven years.

*Proviso*, saving the rights of such persons as at the time the right or title first descended or accrued to them, were within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond Seas, "so as such persons shall, within three years next after full age, discoverture, coming of sound mind, enlargement out of prison, or persons beyond seas, within eight years after the title or claim becomes due, take benefit and sue for the same, and at no time after the times of limitations herein specified; but that all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatsoever, that the expectations of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed, that no man will know of whom to take or buy land."

Where persons in possession of lands, &c. or those under whom they claim have been in possession twenty-one years, under titles derived from sales made either by creditors, executors or administrators of any person deceased, or by husbands and their wives, or by indorsement of patents or other colourable title, such possessions are "ratified, confirmed and declared to be a good and legal bar against the entry of any person or persons, under the right or claim of the state, to all intents and purposes whatsoever; any former act, law or usage to the contrary notwithstanding: *Provided nevertheless*, that the possession so set up shall have been ascertained and identified under known and visible lines or boundaries." (*Act of 1791. Chap. 15.*)

### Limitation of personal actions.

Actions of trespass *quare clausum fregit*; accoutpt render, except such accoutpts as concern the trade of merchandize between merchant and merchant and their factors or servants; actions upon the case; actions of debt for arrearages of rent; actions of detinue and replevin; are limited to three years. (*by Act of 1715. Sect. 5.*)

Actions of trespass, assault and battery, wounding, imprisonment or any of them, limited to one year. (*Ibid.*)

Actions upon the case for words, limited to six months. (*Ibid.*)

If in any of the said actions judgment for the plaintiff be re-



versed on error; or if after verdict for the plaintiff upon matter alleged in arrest of judgment, judgment be given against the plaintiff; or if any of the said actions shall be brought by original writ, and the defendant cannot be attached or legally served with process; then the plaintiff his heirs executors or administrators, as the case shall require, may commence a new action or suit, from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or till the defendant can be attached or served with process, so as to compel him to appear and answer. (*Ibid.* Sect. 6.)

*Proviso*; That if any person entitled to any of the said actions personal, shall at the time such cause of action accrued be within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas; that then such persons shall be at liberty to bring the same actions, so as they bring the same within such times as are before limited, after their coming to or being of full age, discover, of sound memory, at large, or returned from beyond the seas, as other persons having no such impediment might have done. (*Ibid.* Sect. 9.)

"All bills, bonds or notes for money, as well those with seal as those without seal, those which are not expressed to be payable to order or for value received, as those which are expressed to be payable to order, and for value received," are, after the assignment or endorsement thereof, made subject to the operation of the Act of Limitation of this state "in the same manner as it operates by Law against promissory notes." (*Act of 1786. Ch. 4. Sects. 1. & 5.*)

Orphans must, within three years after coming of age, call on their guardians for a full settlement; or else the sureties for the guardians will be discharged from their suretyship. But this act does not extend to persons, *imprisoned, beyond seas, or non compos mentis*. (*Act of 1795, Ch. 15. Sect. 1.*)

• Where any persons have cause of action, against any who are beyond sea, at the time such cause accrued, they may bring suit against such persons so absent, after their return from beyond sea, within the time limited for bringing such action by the act of 1715. (*Act of 1804, Ch. 29.*)

Penal actions, limited to three years; unless in cases where by some particular act, suits are otherwise limited. (*Act of 1808, Ch. 8.*)

Suits on clerk's and sheriff's bonds, limited to six years; *Proviso*; saving the right, of *infants, feme coverts*, and persons *non compos*, so as they bring their suits within three years after disability removed. (*Act of 1810, Ch. 18.*)

Fees due to clerks, sheriffs, &c. must be collected within three years, from the time of judgment, unless the person owing, lives out of the state. (*Act of 1811, Ch. 19.*)

Actions of *debt* grounded on any lending or contract without specialty, limited to *three years* after cause of action accrued; *Proviso* saving the rights of persons under *twenty-one years of age*, *non compos mentis*, *imprisoned or beyond Seas*. (Act of 1814. Chap. 17.)

Action of debt grounded upon the judgment of a justice of the peace limited to *Seven years*, next after the rendition of such judgment or the test of the last execution lawfully issuing on the same. (Act of 1825. Ch. 29. Sect. 1.)

*Proviso*, That persons within the age of twenty-one years, *feme covert*, or *non compos mentis*, or beyond Sea, shall be at liberty to bring said action within *three years* after arriving at full age, *discoverture*, or coming of sound mind, or returning from beyond Sea. (*Ibid* Sec 2)

"All suits on Constables' bonds, if the right of action has already accrued, shall be commenced and prosecuted, within three years after the passage of this act, and not afterwards: and all such suits in case the right of action shall accrue hereafter shall be commenced, and prosecuted within six years after the said right of action shall have accrued and not afterwards: *Saving, nevertheless*, the rights of infants, *feme coverts*, persons *non compos mentis*, and persons beyond seas, so that they sue within three years after their disabilities are removed." (Act of 1826. Ch. 32.)

Prosecutions for trespasses and other misdemeanors except the offences of perjury, forgery, malicious mischief and deceit, limited to three years after the commission of the offence, and no presentment or indictment to be made or found after that period. "*Provided*, that in case any person or persons committing any of the said offences or misdemeanors, shall abscond from without the county, in which the offence was committed, or conceals him or herself, or the said offences shall have been committed in a secret manner, then the said trespasses and misdemeanors shall and may be prosecuted within three years after the return or apprehension of the offender, or discovery of the offence: *Provided always*, that when any prosecution shall be commenced within the time prescribed by this act and judgment shall be arrested for any defect in the indictment, or a *nolle prosequi* shall be entered, that the computation of time in such cases shall be made from the time such prosecution shall have terminated, and not otherwise." (Act of 1826. Ch. 11.)

#### OHIO.

"Act for the limitation of actions." (*Passed 4th January, 1804.*)

"No person or persons shall hereafter sue, have or maintain any writ of ejectment, or other action for the recovery of any possession, title or claim of, to or for any lands, tenements or other

"hereditaments, but within twenty years next after the right of such actions or suits shall have accrued." (*Ch. 3. Sect. 2.*)

"Sect. 1. *Be it enacted by the General Assembly of the State of Ohio*, That all actions herein after mentioned, shall be sued or brought within the times herein after limited; all actions of trespass for assault, menace, battery and wounding, actions of slander for words spoken or libel, and for false imprisonment, within one year next after the cause of such actions or suits; and all action upon book accounts, or for forcible entry and detainer or for forcible detainer, within four years next after the cause of such actions or suits, and all actions of trespass upon real property, trespass, detinue, trover and conversion and replevin; all actions upon the case and all actions of debt for rent shall be sued or brought within six years next after the cause of such actions or suits, and all actions of covenant or debt founded upon a specialty under hand and seal, shall be sued or brought within fifteen years next after the cause of such actions or suits: *Provided*, That no part of the principal or interest be paid or demanded be made within that time."

"Sect. 3. *Provided always, and be it further enacted*, That if any person or persons [*who*,] is or shall be entitled to have, sue or bring any such action or actions as aforesaid, shall be within the age of twenty-one years, insane, *feme covert*, imprisoned or beyond sea, at the time when any such action or actions, may, or shall have accrued, then every such person or persons shall have a right to have, sue or bring any of the action or actions aforesaid within the times hereby before limited in this act, after such disability shall have been removed."

Prosecutions for forfeitures upon any penal statute must be commenced within two years next after the offence committed. *Proviso*, "that when any action, information indictment or other suit, is or shall be limited by any statute to be had, sued commenced or exhibited within a shorter time than is hereby limited, then and in every such case, the action information, indictment or other suit shall be brought within the time limited by such Statute." (*Ibid. Sect. 4.*)

#### •PENNSYLVANIA.

(Act of 26th March, 1785, Chap. 1134, Sect. 2. 3 Rev. Laws.)

Entry into lands &c.; writs of right or any other real or possessory writ or action for lands, &c. limited to twenty-one years.

*Proviso*, Saving the rights of persons within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, or from and without the United States of America, so as such persons or the heirs of such persons, shall within ten years next after disability removed, take benefit of or sue for the same. And in case of the death of such persons under any of the disabilities aforesaid, their heirs shall have the same benefit that such

persons might have had by living until such disabilities had ceased or were removed; and if any abatement happen in any proceedings upon such right or title, they may be renewed and continued, within three years from the time of such abatement but not afterwards. (*Ibid. Sect. 4.*)

By the Act of 11th March, 1800, Chap. 2118, the above act is "declared to have no force or effect within what is called the seventeen townships, in the county of Luzerne, nor in any case where title is, or has at any time, been claimed under what is called the Susquehanna Company, or in any way under the state of Connecticut, for any lands or possessions within this Commonwealth."

#### Limitations of personal actions.

Act of 27th March, 1713, Chap. 196, Sect. 1. (1 *Rev. Laws* 89.)

Actions of trespass *quare clausum fregit*, actions of detinue, trover and replevin, for taking away goods and cattle, actions upon account and upon the case, (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants,) actions of debt, grounded upon any lending, or contract without specialty, and all actions of debt for arrearages of rent, except the proprietaries' quit-rents, limited to six years.

Actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, limited to two years. (*Ibid.*)

Actions upon the case for words, limited to one year. (*Ibid.*)

If in any of the said suits, judgment be given for the plaintiff and the same be reversed for error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his writ, plaint or bill, then the plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action or suit, from time to time, within a year after such judgment reversed or given against the plaintiff as aforesaid, and not after. (*Ibid. 3 Sect.*)

*Proviso*, Saving the rights of persons, in all the above cases, who at the time of any cause of such action given or accrued, fallen or comè, shall be, within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond sea, who shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, after their disabilities removed. (*Ibid. Sect. 5.*)

Suits on promissory notes limited to "such time as is appointed for commencing or suing actions upon the case" by the above Act. (*Vide, Act of 28th May, 1715, Chap. 207, Sect. 6. 1 Rev. Laws, 102.*)

Suits against Justices of the Peace, Constables or other officers, or persons acting by their order, &c. limited to six months. (*Act of 21st March, 1772, Chap. 642, Sec. 7. 2 Rev. Laws, 40.*)

Writ of Error or Appeal to avoid or reverse any fine or common recovery, or any judgment, limited to seven years: *Proviso*, saving the rights of persons "within the age of twenty-one years, "covert, non compos mentis, in prison, or out of the limits of the "United States of America," so as such persons bring their writ of Error or Appeal within five years after their disability removed. (*Act of 13th April, 1791, Chap. 1564, Sect. 20. 4 Rev. Laws, 66.*)

Suits against Sheriff's Sureties limited to five years. (*Act of 28th March, 1803, Chap. 2355, Sect. 4. 7 Rev. Laws, 104.*)

Prosecutions upon penal statute for forfeitures to the commonwealth only, limited to two years; prosecution for forfeitures to the commonwealth and to any person or persons that shall prosecute in that behalf, shall be brought by any person who may lawfully sue for the same, within one year; and in default of such pursuit, than the same shall be brought for the commonwealth, any time within one year after that year ended; and where a shorter time is limited by any act of Assembly, the prosecution shall be within that time. (*Act of 26th March, 1785, Chap. 1534, Sect. 6.*)

#### RHODE ISLAND.

The Statutes of 32 *Henry*, 8. *Ch. 2.* and of 21 *James* 1 *Ch. 16.*, are in force in the State of Rhode Island. (*Vide, Inman vs. Barnes, 2 Gallison's Rep. 316, 317.*)

The act entitled "an Act for quieting possessions and avoiding suits at law," declares, "That where any person or persons, or others, from whom he or they derive their titles, "either by themselves, tenants, or lessees, shall have been, for the "space of twenty years, in the uninterrupted, quiet, peaceable, "and actual, seisin and possession, of any lands, tenements, or hereditaments within this State, for and during the said time, claiming the same as his, her, or their proper, sole and rightful estate "in fee simple, such actual seisin and possession shall be allowed "to give and make a good and rightful title to such person or persons, their heirs or assigns forever. And this act being "pleaded in bar, to any action that shall hereafter be brought for "such lands, tenements and hereditaments, and such actual "seisin and possession being duly proved, shall be allowed to be "good valid and effectual in the law for barring the same." To this act there is the following *Proviso*.

"*Provided further*, That nothing above contained shall extend "or be construed, or deemed to extend, to bar any person or persons having any estate in reversion or remainder expectant

"or depending in any lands, tenements or hereditaments, after the end or determination of the estate for years, life, or lives, such person or persons pursuing his or their title, by due course of law, within ten years after his or their right of action shall accrue, any thing in this act, to the contrary notwithstanding." (*Ibid.*)

Limitation of personal actions.

("An act for the limitation of certain personal actions." 1 *Rev. Laws*. 471.)

All actions of trespass to personal property, detinue, trover or replevin; actions of account and upon the case, except such accounts as concern trade or merchandize between merchant and merchant, their factors or servants; and excepting actions for slander; actions of debt founded upon any contract without specialty, and actions of debt for the arrearages of rent; limited to six years. (*Ibid Sect. 1.*)

Actions of trespass for breaking inclosures or closes, and all other actions of trespass for assault, battery, wounding and imprisonment or any of them, shall be brought within four years, next after the cause of such action or suit, and not after. (*Ibid.*)

Actions upon the case for words, limited to two years. (*Ibid.*)

If any person against whom there is any of the above causes of action, was at the time the same accrued without the limits of the state, and did not leave property or estate therein that could by the common and ordinary process of law be attached, that then, and in such case, the person who is entitled to bring such suit or action, shall be at liberty to commence the same within the respective periods before limited, after such person's return into this state. (*Ibid. Sect. 2.*) (*Act of May 2, 1822.*)

*Proviso*, That if any person entitled to any such action shall be at the time the cause thereof accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond sea, then and in such case, such person shall be at liberty to bring the same within such times as are herein before limited, after their being of full age, discoverture, of sane memory, or at large, or returned from beyond sea. (*Ibid. Sect. 3.*)

Limitation of criminal actions.

("An Act to reform the penal Laws." *Rev. Laws*, 603.)

"Sec. 52. And be it further enacted, That no person shall be prosecuted, tried or punished, for any crimes or offences whatsoever, excepting those hereafter mentioned, unless the indictment for the same shall be found or instituted within three years from the time of committing the crime or offence, or incurring the fine or forfeiture. *Provided*, That the aforesaid limitation shall not extend to the crimes of murder, arson, counterfeiting, forgery, polygamy, rape, robbery, horse-stealing, or other theft,

"or any of them; and *provided also*, that nothing herein contained shall extend to any person or persons fleeing from justice."

### SOUTH CAROLINA.

(Public Laws, page 101. Act of December 12, 1712.)

"If any person or persons to whom any right or title to lands, tenements or hereditaments, within this province shall hereafter descend or come, do not prosecute the same within 5 years after such right or title accrued, that then he or they, and all claiming under him and them, shall be for ever barred to recover the same, excepting any person or persons beyond the seas, or out of the limits of this province, feme covert or imprisoned, who shall be allowed the space of 7 years to prosecute their right or title, or claim to any lands, tenements or hereditaments, in this province, after such right and title accrued to them or any of them, and at no time after the said seven years; and also excepted, any person or persons that are under the age of 21 years, who shall be allowed to prosecute their claims of any time within 2 years after they come to age, and if beyond the seas, 3 years." (*Ibid. Sect. 2.*)

"Persons under 21 years shall be allowed 5 years after attaining the said age to prosecute their right or title to lands, and 4 years after attaining such age to prosecute any personal action to which they are or may be entitled; any thing in the said Act, passed 12th of December, to the contrary hereof in any wise notwithstanding." (*Act of 29th February, 1788, Sect. 2. Public Laws, page 455.*)

Claim to lands to be effectual, must be made by "action of law duly entered in the Court of Common Pleas within this province, according to the former practices and rules of the said Court." (*Act of December 12th, 1712, Sect. 3.*)

Not only the persons which have not made their claim to any lands, &c. within the time limited by this act shall be barred, but also all manner of persons whatsoever, that shall at any time claim under such person or persons who have lost their claim, shall be in like manner barred by this Act. (*Ibid. Sect. 5.*)

#### Limitation of personal actions.

Actions of trespass *quare clausum fregit*, actions of trespass, detinue, actions *sur trover*, and replevin for taking away of goods and chattels, actions of account, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, actions upon the case other than for slanders, all actions of debt grounded upon any lending or contract without specialty, actions of debt for arrearages of rent reserved by indenture, and all actions of covenant, limited to four years. (*Ibid. Sect. 6.*)

Actions of trespass, of assault and battery, wounding, imprisonment, or any of them, limited to one year. (*Ibid.*)

Actions upon the case for words, limited to six months. (*Ibid.*)

If in any of the said actions "judgment be given for the plaintiff and the same be reversed by error, or a verdict pass for the plaintiff and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he takes nothing by his plaint, writ or bill, or if any of the said actions be brought by original, and the defendant shall be outlawed therein, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within 1 year after such judgment reversed, or judgment given against the plaintiff, or outlawry reversed, and not after." (*Ibid. Sect. 7.*)

*Proviso*, That persons entitled to any such action, if at the time the cause thereof accrued, beyond the seas, or feme covert, or imprisoned, shall be at liberty to bring their action within 5 years after such cause of action accrued, and at no time after; and also excepting any persons that are under the age of 21 years, who shall be allowed to bring their action at any time within 2 years after they come to age, and if beyond the seas 3 years. (*Ibid. Sect. 10.*) (But by Act of 29th February, 1788, "Persons "under 21 years" shall be allowed 4 years after attaining such age to prosecute any personal action to which they are or may be entitled.)

"And whereas by this Act a person being a feme covert, is limited as to the time of laying claim to lands or tenements, and to commencing actions or suits of law, and not excepted generally until discoveriture and that such person may be no way prejudiced by the same, *Be it further enacted*, That in case any feme covert have any right or claim to any lands or tenements within this province, or any other action or suit whatsoever, such feme covert shall have power to constitute an attorney, under her hand and seal, to prosecute such her claim; action or suit, either in her own name or the name of her husband and self, as if her husband had joined with her in such power of attorney, and such person so constituted shall have power to prosecute such suit or claim to effect, and her husband shall not have power to abate, discontinuance or release her claim or action, without her voluntary consent given in open court, and recorded in the proceedings, neither shall such suit or action be any way abated upon the account of such woman being under coverture, but the proceedings shall be in all things as good and effectual in law, as if such woman was sole, or her husband joined with her in such suit, any law, statute, act, usage or custom to the contrary notwithstanding." (*Ibid. Sect. 16.*)



Any person *non compos mentis*, at the time the right of action accrued, "notwithstanding the several limitations above said, "shall have liberty at any time to make his claim or bring his actions or suit," except suits against executors, or for the redemption of mortgaged goods and chattels, "within a year after coming of sound mind if resident in this province, and within 2 years if beyond the seas, or otherwise out of the limits of this province, and at no time after." (*Ibid. Sect. 17.*)

If negroes, or any kind of personal property, be sold by bill of sale by way of mortgage, with right of redemption upon performance of the proviso in the said bill of sale, and are in the actual possession of the mortgagee, ("and not a delivery or seizin in form of law only,) "and shall continue in the same for the space of 2 years after the breach of the proviso in the said bill of sale, "without redemption thereof," the sale becomes absolute, and the mortgagor is barred; excepting such mortgagor "be beyond the seas, or otherwise out of the limits of this province, or a feme covert, all which persons shall have saved to them their equity of redemption, so as they prosecute the same within 3 years after the breach of the proviso of the bill of sale, and at no time after." (*Ibid. Sect. 15.*)

No "discount or set-off shall be admitted or allowed contrary to the intention and meaning of" the Act of Limitations, of December 12th, 1712." (*Act of 7th April, 1759, Sect. 2. Public Laws, 247.*)

"Any person or persons whatsoever, who shall hereafter be in the custody of the Provost Marshal of this province, or of his Gaol keeper or deputy, and who shall once petition the Justices of this province for his or her discharge; every such person or persons his or their executors or administrators, shall be incapacitated for ever afterwards to plead the Act of limitations of this province, in bar to any action that may be brought against him or them, by any person or persons that were his or their creditors, for any demand or cause of action that existed at the time of exhibiting the petition for the discharge of the said person when in custody." (*Act of 7th April, 1759, Sect. 10. Public Laws, page 251. No. 907. Perpetuated by Act of March 12th, 1783. Public Laws, page 312. No. 1275.*)

"Every Executor or Administrator shall give 3 weeks notice by advertisement in the State Gazette, or at 3 different places of the most public resort in the parish or County for Creditors to render an account of their demands, and they shall be allowed 12 months to ascertain the debts due to and from the deceased, to be computed from the probate of the Will, or granting Letters of Administration, and Creditors neglecting to give in a state of their debts within the time aforesaid, the Executors or Administrators shall not be liable to make good the same, nor shall any action be commenced against

"any Executor or Administrator for the recovery of the debts due by the Testator or Intestate, until 9 months after such Testator or Intestate's death." (*Act of March 13th, 1789, Sect 27. Public Laws, page 312. No. 1275.*)

Prosecutions for penalties or forfeitures imposed by any Act of the General Assembly, must be brought within 6 months after the offence committed, unless the time is otherwise provided for by the act imposing the penalty. *Act of 20th May, 1748. Public Laws, page 216. No. 785.*)

### TENNESSEE.

(*Act of 16 November 1819. Ch. 28.*)

Seven years possession of lands, &c. which have been granted by this State or the State of North Carolina, where the same have been held or claimed by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted against such possession within that time, entitles the possessor to keep and hold in possession such quantity of land as shall be specified and described in his, her or their deed of conveyance, devise, grant or other assurance, as aforesaid in preference to, and against all, and all manner of person or persons whatsoever; and "shall have a good and indefeasible title in fee simple to such lands tenements, or hereditaments; any law usage or custom to the contrary notwithstanding." And all persons having a legal or equitable title which they neglect for seven years to prosecute effectually against such possessor, shall be forever barred. (*Section 1.*)

*Proviso.* Saving the rights of persons who shall be at the time the said right or title first descended, accrued, come or fallen, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the limits of the United States and the territories thereof, so as they bring their action within three years next after such disability removed. "*Provided also, That* in the construction of this saving no cumulative disability shall prevent the bar aforesaid; but shall only apply to that or those disabilities, which existed, when the right to sue first accrued and no other; and provided also, that such suit so commenced to save the bar, shall be a suit prosecuted with effect and no other."

All suits or actions either in law or equity for any lands, &c. limited to seven years. (*Sect. 2.*)

*Provisoes,* the same as to the first section.

If judgment given for the plaintiff in any of the said suits be reversed by writ of Error; or if verdict pass for the plaintiff and upon matter alleged in arrest of judgment, the judgment be given against him, or if any of the said actions be commenced by orig-

inal writ, and the defendant cannot be legally attached or served with process, in all such cases, the plaintiff his heirs executors or administrators as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed or such judgment given against him, or until the defendant can be attached, or served with process, so as to compel him, her or them, to appear and answer; and *provided also*, that this act shall have no bearing on the lands reserved for schools. (Sect. 3.)

Limitation of personal actions.

(Act of 1715, c. 27. s. 5.)

Actions of account render, (except such accounts as concern the *trade* of merchandize between merchant and merchant, their factors or servants); actions upon the case, except for slander; debt for arrearages of rent; detinue; replevin; and trespass *quare clausum fregit*; are limited to three years.

Actions of trespass, assault and battery, wounding and imprisonment or any of them, limited to one year.

Actions upon the case for words, limited to six months.

*Proviso*, Saving to such persons as are at the time of the cause of action accrued within twenty-one years of age; *feme covert*; *non compos mentis*; *imprisoned*; or *beyond the seas*; their rights; so as they bring their actions within the times before limited, after their disabilities removed. (Sect. 9.)

The saving in the 6th section is the same as in the 3d section of the act relative to actions for lands.

In an action upon a *book account* for goods wares and merchandize sold and delivered, or work done, the plaintiffs oath shall not be admitted to prove any charges of more than two years standing. (Act of 1756, Ch. 4.)

And no such *book* of accounts, although proved by witnesses, shall be received in evidence for charges of above five years standing before suit brought, except of persons being out of the state, or where the account shall be signed and settled by the parties. (*Ibid.*)

The creditors of any deceased person, if they reside within the state are limited to two years. and if out of the state, to three years, after the executors or administrators have qualified, to make demand and bring suit, and on failure to do so within those times, shall be forever barred; saving to infants, persons *non compos mentium*, and *femes covert*, one year after the disability removed. (*Ibid.*)

But if any creditor after making demand as aforesaid of the executor or administrator shall, at their special request delay his suit, the demand shall not be barred during the time of such indulgence. (*Ibid.*)

By the same act executors and administrators are required to give public notice to the creditors to bring in their demands.

Writ of error to reverse any judgment or decree, limited to two years; *saving to infants, femes covert, persons non compotes mentium, imprisoned, beyond seas, or in the military service of the United States, two years for suing the same after the disability removed.* (*Act of 1799, Ch. 12.*)

Bill of review or motion for one limited to three years from pronouncing the decree; *saving to infants, femes covert, persons non compotes mentium, imprisoned, or beyond Seas, three years after disabilities removed.*

Indictment or presentment for assault, battery or affray, or for neglect of duty of any Overseer of any public road limited to twelve months; but if the person accused removes or absconds from the county where such offence was committed, the time is extended to twelve months after his return. (*Act of July 26, 1820, Chap. 9.*)

#### VERMONT.

(*Act of 6 November 1797, Ch. 110. 2 Digested Laws page 405.*)

Writ of right or other real action; action of ejectment, or other possessory action, of whatever name or nature limited to fifteen years. (*Sec. 6*)

Entry into lands, &c. limited to fifteen years. (*Ibid.*)

Actions of trespass *quare clausum fregit*, actions of trespass, detainue, trover or replevin for goods or cattle; actions of account and upon the case, other than such as concern the trade of merchandize, between merchant and merchant, their factors and servants; and except actions upon the case for slander; actions of debt grounded on any lending or contract, without specialty, and actions of debt for arrearages of rent, limited to six years. (*Sect. 7.*)

Actions of assault, menace, battery, wounding, imprisonment or any of them limited to three years. (*Ibid.*)

Actions on the case for slander, limited to two years. (*Ibid.*)

Actions upon promissory notes in writing, (attested by one or more witnesses) limited to fourteen years. (*Sect. 8.*)

Actions on promissory notes in writing, unattested, limited to six years. (*Ibid.*)

Actions of debt or *scire facias* on judgment limited to eight years next after the rendition of the judgment. (*Ibid.*)

All actions of covenant limited to eight years; except "actions of covenant, brought on any covenant or covenants, contained in any deed of conveyance of lands, as aforesaid, within ten

"years next after there shall have been a final decision against the title of the covenantor, in such deed." (*Ibid.*)

If upon any of the said actions, judgment for the plaintiff be reversed by writ of error, or a verdict pass for the plaintiff and for matter alleged in arrest of judgment, judgment be given against him, and also where judgment shall be rendered against him on any plea in abatement or demurrer, and the merits of the cause shall not be tried; in all such cases the plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment, and not after. (*Sect. 9.*)

"This act shall not extend to bar any infant, *feme covert*, person imprisoned, or beyond Seas, without any of the United States, or *non compos mentis*, from bringing either of the actions before mentioned, within the term before set and limited for bringing such actions, calculating from the time such impediment shall be removed. And if any person, against whom there is, or hereafter may be any cause or suit, for any or every the species of personal actions before enumerated, who at the time the same accrued, was without the state, and shall not have property therein which could by the common and ordinary process of Law, be attached; that then and in every such case, the person who was entitled to bring such action or suit, shall have liberty to commence the same, within the respective periods, before limited after such absent person's coming or return into this State." (*Sect. 10.*)

Writ of error or suit for reversing any "judgment or proceedings, in course of justice, in any real or personal action," limited to one year next after the rendition of such judgment, or the intervention of such error or defect: "Saving always unto infants, *feme coverts*, persons *non compos mentis*, persons in prison, beyond seas, or without the United States, the right of bringing any writ of error or suit for reversing any judgment or proceedings in the course of justice, at any time within one year next after such impediment shall be removed, and not after." (*Sect. 11.*)

But "nothing contained in any Statute of Limitation, heretofore passed, shall be construed to extend to any lands, granted, given, sequestered or appropriated to any public pious or charitable use; or to any lands belonging to this state. And any proper action of ejectment or other possessory action may be commenced, prosecuted or defended, for the recovery of any such land or lands: any thing in any Act or Statute of Limitations, heretofore passed to the contrary, notwithstanding." ("Act relating to public lands." Passed 11th November 1802. 2 Digest of Laws, 411. & Vide Act of 26th October, 1801; 2 *Ibid.* 410.)

These two last mentioned acts, however, were, by the act of 16th November, 1819, Chap. 15, *repealed*, "so far as they relate to the rights of land in this state, granted to the Society for the propagation of the Gospel in foreign parts."

#### CRIMINAL OFFENCES.

Prosecutions for theft, robbery, burglary, and forgery; limited to six years. (*Act of 6th November, 1797. Ch. 110. Sect. 3.*)

Prosecutions for any other crime or misdemeanor (arson and murder excepted,) limited to three years. (*Ibid. Sect. 3.*)

But when any prosecution for any crime or misdemeanor is limited by any statute to a shorter time than is above limited, such prosecution shall be brought within such shorter time. (*Ibid. Sect. 4.*)

Prosecutions for any forfeiture upon any penal statute, for the whole or in part to the informer limited to one year. And in default of such pursuit then the same shall be brought by the state within two years from the commission of the offence. (*Ibid. Sect. 1.*)

But if limited by any penal Statute to a shorter time, then such prosecutions shall be brought within such shorter time. (*Ibid. Sect. 2.*)

But the first section of the last above mentioned act, "shall not be construed to extend to any case, where the remedy for the forfeiture or forfeitures on any penal statute, is or shall be given to the person or persons injured or aggrieved, or to him, her, or them, and the state, county or town treasurer, any law or usage to the contrary, notwithstanding." (*Act of 10th November, 1810, Ch. 110. Vol. 3 page 268.*)

#### VIRGINIA.

Writs of right upon the seisin or possession of the demandant's ancestor or predecessor, limited to fifty years.

Other possessory actions, upon the like seisin or possession, limited to forty years.

Real action upon demandant's own seisin or possession limited to thirty years.

Writs of Formedon in descender, remainder or reverter of any lands, tenements or hereditaments, limited to *twenty years next* after the title or cause of action accrued. And entry into lands, &c. limited to the same time.

*Proviso*; Saving the rights of any persons, under the age of one and twenty years, *feme covert, non compos mentis*, imprisoned, or not within this commonwealth at the time such right or title accrued, who and his heirs, may, notwithstanding the said twenty years are expired bring and maintain his action, or make

his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards.

#### PERSONAL ACTIONS.

Actions upon the case other than for slander; actions of account other than such accounts as concern the trade of merchandize between merchant and merchant their factors or servants, actions of debt grounded upon any lending or contract without specialty; actions of debt for arrearages of rent; actions of trespass, detinue, trover and replevin for taking away of goods and chattels; actions of trespass *quare clausum fregit*; limited to five years.

Actions of trespass, assault, battery, wounding, imprisonment, or any of them, limited to three years.

Actions upon the case for words, limited to one year.

*Proviso*; Saving the rights of any person entitled to any of the above mentioned causes of action, who at the time the same shall accrue, may be within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, beyond the seas, or out of the country; they may bring their suits within such times as are before limited, after their disabilities removed.

*Scire Facias*, or action of debt on judgment limited to ten years after the date of such judgment. Or where execution is issued, and no return is made thereon the party in whose favour the same was issued may obtain other executions, or move against the sheriff or other officer or his or their securities for not returning the same for the term of ten years from the date of such judgment and not after.

*Proviso*, Saving the rights of persons under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or not within this commonwealth at the time of such judgment being awarded, and whether execution hath issued or not, who may take their remedy within five years after such disabilities removed, and not after.

Actions founded upon any account for goods, &c. sold and delivered, or for any articles charged in any store account, limited to one year from the delivery, "except that in case of the death "of the creditors or debtors, before the expiration of the said "term of one year, the further time of one year from the death "of such creditor or debtor, shall be allowed for the commencement of such action or suit."

If in any of the said actions judgment for the plaintiff be reversed by error; or if after verdict for him, upon matter alleged in arrest of judgment, judgment be given against the plaintiff, in such case he, his heirs executors or administrators, as the case shall require, may commence a new suit within one year thereafter.

Suits brought in the name of any person residing beyond the seas or out of this country, for any debt due for goods actually sold and delivered here by his Factor, are not saved by any of the Provisoos of this act; but if the factor should happen to die before the expiration of the time in which suit should have been brought, the principal shall be allowed two years from the death of his factor, to commence suit.

If the defendant to any of the aforesaid actions, shall abscond or conceal himself, or by removal out of the country, or the county where he shall reside, when such cause of action accrued, or by any other indirect ways or means, defeat or obstruct any person or persons who have title thereto, from bringing or maintaining such action within the time limited by this act, then such defendant is not to be admitted to plead this act in bar of such action.

"This act shall not extend to any action which shall be commenced against any master or commander of a ship or vessel who shall discharge or cause to be put on shore any sick or disabled sailor belonging to his ship or vessel, or any servant without taking due care for their maintenance and cure, or carrying any debtor, servant or slave out of this commonwealth contrary to law."

If any suit shall be brought against any executor or administrator, for the recovery of any debt, due upon an open account, it shall be the duty of the court before whom such suit shall be brought, to cause to be expunged from such account, every item thereof which shall appear to have been due five years before the death of the testator or intestate. Saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned or out of this commonwealth, who may be plaintiffs in such suits, three years after their several disabilities removed.

"No action of debt shall be brought against any executor or administrator upon a judgment obtained against his testator or intestate, nor shall any *Scire facias*, be issued against any executor or administrator to revive such judgment after the expiration of five years from the qualification of his executor or administrator, and all such judgments after the expiration of five years upon which no proceedings shall have been had, shall be deemed to have been paid and discharged. Saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned, or out of this commonwealth, who may have been entitled to the benefit of any such judgment, three years after their several disabilities removed."

No bill of review to any final decree in chancery shall be granted unless the same be applied for within three years next after such final decision: saving to *infants*, *femes covert*, *persons of insane mind*, persons imprisoned or out of the state, in the service of this state, or of the United States a right to obtain such bill of



review, within three years after their respective disabilities are removed.

No writ of error or *supersedeas* shall be granted to any judgment of a court of law, after the expiration of *five* years from the time when such judgment shall have been made final: *Saving* to infants, &c., (as in the last clause,) three years after their respective disabilities are removed.

Prosecutions for offences not punishable with death, or confinement in the penitentiary house, limited to one year after the offence committed.

Prosecutions for perjury, subornation of perjury or such forgeries or publications thereof, as may not be punishable with death, or imprisonment in the jail or penitentiary house, limited to three years after the time of committing the offence.

#### UNITED STATES.

The following are the Limitations prescribed in cases where the United States, or their officers or agents are concerned.

Resolution of Congress, November 2, 1785. (*Laws of U. S. Vol. 1, p. 691, Bioren's Ed.*)

"*Resolved*, That all persons having claims for services performed in the military department, be directed to exhibit the same for liquidation to the commissioners of army accounts, on or before the first day of August, ensuing the date hereof; and that all claims, under the description abovementioned, which may be exhibited after that period, shall forever thereafter be precluded from adjustment or allowance, and that the commissioner of army accounts give public notice of this resolve in all the states, for the term of six months.

Section 67 of the act entitled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise, imported into the United States, and on the tonnage of ships or vessels." [*Approved, August 4, 1790*]; (*Laws of U. S. Vol. 2, p. 171.*) And section 89 of the act entitled "An act to regulate the duties on imports and tonnage," [*Approved, March 2, 1799*]; (*Laws of U. S. Vol. 3, p. 222.*) each contain the following *Proviso*.

"*And provided*, That no action or prosecution shall be maintained in any case under this act, unless the same shall have been commenced within three years next after the penalty of forfeiture was incurred."

The 2d volume of the Laws of the United States contains the following Limitations.

"CHAP. 112. [XI.] An act to provide for the settlement of the claims of widows and orphans, barred by the Limitations

“heretofore established, and to regulate the claims to invalid pensions.

“[SECT. 1.] *Be it enacted by the senate and house of representatives, of the United States of America in congress assembled,* That the operation of the resolutions of the late congress of the United States, passed on the second day of November, one thousand seven hundred and eighty-five, and the twenty-third day of July, one thousand seven hundred and eighty-seven, so far as they have barred, or may be construed to bar, the claims of the widow or orphans of any officer of the late army, to the seven years' half pay of such officer, shall, from and after the passing this act, be suspended for and during the term of two years.” [Approved, March 23, 1792.] 2 *Ibid* 259.

“CHAP. 113. [XII.] An act providing for the settlement of the claims of persons under particular circumstances, barred by the limitations heretofore established.

“[SECT. 1] *Be it enacted by the senate and house of representatives of the United States of America in congress assembled,* That the operation of the resolutions of the late congress of the United States, passed on the second day of November, one thousand seven hundred and eighty-five, and the twenty-third day of July, one thousand seven hundred and eighty-seven, so far as they have barred, or may be construed to bar, the claims of any officer, soldier, artificer, sailor, or marine, of the late army or navy of the United States, for personal services rendered to the United States, in the military or naval department, shall, from and after the passing of this act, be suspended, for and during the term of two years. And that every such officer, soldier, artificer, sailor and marine, having claims for services rendered to the United States, in the military or naval departments, who shall exhibit the same for liquidation, at the treasury of the United States, at any time during the said term of two years, shall be entitled to an adjustment, and allowance thereof, on the same principles as if the same had been exhibited within the term prescribed by the aforesaid resolutions of congress: *Provided,* That nothing herein shall be construed to extend to claims for rations or subsistence money.” [Approved March 27, 1792,] 2 *Ibid*. 261.

“CHAP. 151. [VI.] An act relative to claims against the United States, not barred by any act of limitation, and which have not been already adjusted.

“[SECT. 1.] *Be it enacted by the senate and house of representatives of the United States of America in congress assembled,* That all claims upon the United States, for services or supplies, or for other cause, matter, or thing, furnished or done, previous to the fourth day of March, one thousand seven hundred and eighty-nine, whether founded upon certificates, or other written documents from public officers, or otherwise, which have not al-

"ready been barred by any act of limitation, and which shall not be presented at the treasury before the first day of May, one thousand seven hundred and ninety-four, shall forever after be barred and precluded from settlement or allowance: *Provided*, That nothing herein contained, shall be construed to affect loan office certificates, certificates of final settlement, indents of interest, balances entered in the books of the register of the treasury, certificates issued by the register of the treasury, commonly called registered certificates, loans of money obtained in foreign countries, or certificates issued pursuant to the act, entitled "An act making provision for the debt of the United States:" *And provided further*, That nothing herein contained, shall be construed to prohibit the proper officers of the treasury from demanding an account, or accounts, to be rendered, for any moneys heretofore advanced, and not accounted for, or from admitting, under the usual forms and restrictions, credits for expenditures, equal to the sums which have been so advanced." [Approved, February 12, 1793.] 2 *Ibid.* 330.

"CHAP. 162. [XVII.] An act to regulate the claims to invalid pensions."

"[SECT. 4.] *And be it further enacted*, That no claim to a pension shall be allowed under this act, which shall not be presented within two years from the passing the same." [Approved, February 28, 1793.] 2 *Ibid.* 353, 355.

"CHAP. 197. [XXI.] An act limiting the times for presenting claims for destroyed certificates of certain descriptions.

"[SECT. 1.] *Be it enacted by the senate and house of representatives of the United States of America in congress assembled*, That all claims for the renewal of certificates of the unsubscribed debt of the United States, of the descriptions commonly called "Loan office certificates," or "Final settlements," which may have been accidentally destroyed, shall be forever barred, and precluded from settlement or allowance, unless the same shall be presented at the treasury, on or before the first day of June, in the year one thousand seven hundred and ninety-five. [Approved, April 21, 1794.] 2 *Ibid.* 389.

"CHAP. 286. [CX.] An act making further provision for the support of public credit, and for the redemption of the public debt."

"[SECT. 14.] *And be it further enacted*, That all certificates, commonly called loan office certificates, final settlements, and indents of interest, which at the time of passing this act, shall be outstanding, shall on or before the first day of January, in the year one thousand seven hundred and ninety-seven, be presented at the office of the auditor of the treasury of the United States, for the purpose of being exchanged for other certificates of equivalent value and tenor, or, at the option of the holders

"thereof, respectively, to be registered at the said office, and returned; in which case, it shall be the duty of the said auditor to cause some durable mark or marks to be set on each certificate, which shall ascertain and fix its identity, and whether genuine or counterfeit, or forged; and every of the said certificates, which shall not be presented at the said office, within the said time, shall be forever after barred or precluded from settlement or allowance." [Approved, March 3, 1795.] 2 *Ibid.* 491, 497.

"CHAP. 42. [XV.] An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."

Section 2. Which gives a remedy by action for the penalties prescribed for a violation of this act, contains the following *Proviso*.

"*Provided always*, That such action be commenced within one year after the cause of such action shall arise, and not afterwards." [Approved, May 31, 1790.] 2 *Ibid.* 104, 106.

"CHAP. 36. [IX.] An act for the punishment of certain crimes against the United States."

"[SECT. 31.] *And be it further enacted*, That no person or persons shall be prosecuted, tried, or punished, for treason, or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid, shall be done or committed; nor shall any person be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice." [Approved, April 30, 1790.] 2 *Ibid.* 92, 99.

The 3d volume contains the following Limitations:

"CHAP. 68. [LXVIII.] An act respecting loan office and final settlement certificates, indents of interest, and the unfunded or registered debt, credited in the books of the treasury.

"SECT. 1. *Be it enacted by the senate and house of representatives of the United States of America in congress assembled*, That so much of the act, entitled "An act making further provision for the support of public credit, and for the redemption of the public debt," passed the third day of March, one thousand seven hundred and ninety-five, as bars from settlement or allowance, certificates, commonly called loan office and final settlement certificates, and indents of interest, be, and the same is hereby amended for the the term of

" year from and after the time of the passing of this act : a notification of which temporary suspension of the act of limitation shall be published by the secretary of the treasury, for the information of the holders of the said certificates, in one or more of the public papers in each of the United States." [*Approved, June 12, 1798.*] 3 *Ibid.* 56.

" CHAP. 86. [LXXXVI.] An act limiting the time, within which claims against the United States, for credits on the books of the treasury, may be presented for allowance.

" SECT. 1. *Be it enacted by the senate and house of representatives of the United States of America in congress assembled,* That all credits on the books of the treasury of the United States for transactions during the late war, which, according to the course of the treasury, have hitherto been discharged by issuing certificates of registered debt, shall be forever barred and precluded from settlement or allowance, unless claimed by the proper creditors, or their legal representatives, on or before the first day of March, in the year one thousand seven hundred and ninety-nine. And the secretary of the treasury is hereby required to cause this act to be published in one or more of the public papers of each state." [*Approved, July 9, 1798.*] 3 *Ibid.* 78.

" CHAP. 296. [XXXVI.] An act supplementary to an act, entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned," and extending the benefits thereof to the arts of designing, engraving, and etching, historical and other prints."

" SECT. 4. *And be it further enacted,* That if any person or persons, from and after the passing of this act, shall print or publish any map, chart, book or books, print or prints, who have not legally acquired the copy right of such map, chart, book or books, print or prints, and shall, contrary to the true intent and meaning of this act, insert therein, or impress thereon, that the same has been entered according to act of congress, or words purporting the same, or purporting that the copy right thereof has been acquired ; every person, so offending, shall forfeit and pay the sum of one hundred dollars, one moiety thereof to the person who shall sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt, in any court of record in the United States having cognizance thereof : *Provided always,* That in every case for forfeitures herein before given, the action be commenced within two years from the time the cause of action may have arisen." [*Approved, April 29, 1802.*] 3 *Ibid.* 493, 494.

" CHAP. 393. [XL.] An act in addition to the act, entitled "An act for the punishment of certain crimes against the United States."

"SECT. 3. *And be it further enacted*, That any person or persons guilty of any crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding." [Approved, March 26, 1804.] 3 *Ibid.* 611.

The 4th Volume contains the following.

"CHAP. 21. [XXI.] An act relating to bonds given by marshals."

"SECT. 4. *And be it further enacted*, That all suits on marshals' bonds, if the right of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards. And all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards; saving, nevertheless, the rights of infants, feme covert, and persons non compos mentis, so that they sue within three years after their disabilities are removed." [Approved, April 10, 1806.] 4 *Ibid.* 28, 29.

The 6th Volume contains the following.

"CHAP. 339. An ACT to authorize the Payment of certain Certificates.

"[SECT 1.] *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That so much of an Act, entitled "An Act making further provision for the support of public credit, and for the redemption of the public debt," passed the third day of March, one thousand seven hundred and ninety-five; and so much of the Act, entitled "An Act respecting loan office and final settlement certificates, indents of interest, and the unfunded and registered debt, credited on the books of the Treasury," passed the twelfth day of June, one thousand seven hundred and ninety-eight, as bars from settlement or allowance certificates commonly called loan office and final settlement certificates, and indents of interests, be, and the same is hereby, suspended for the term of two years, from and after the passing of this act; a notification of which temporary suspension of the act of limitation shall be published by the Secretary of the Treasury, for the information of the holders of the said certificates, in one or more of the public papers in each of the United States." [Approved, 13 April, 1818.] 6 *Ibid.* 286, 287.

"CHAP. 373. An ACT in addition to "An Act to prohibit the Introduction of Slaves into any Port or Place within the Jurisdiction of the United States, from and after the first day of

" January, in the year of our Lord one thousand eight hundred and eight," and to repeal certain parts of the same."

" SECT. 9. *And be it further enacted*, That any prosecution, information, or action, may be sustained, for any offence under this act, at any time within five years after such offence shall have been committed, any law to the contrary notwithstanding.

" SECT. 10. *And be it further enacted*, That the first six sections of the act to which this is in addition, shall be, and the same are hereby, repealed: *Provided*, That all offences committed under the said sections of the act aforesaid, before the passing of this act, shall be prosecuted and punished, and any forfeitures which have been incurred under the same shall be recovered and distributed, as if this act had not been passed." [Approved 20 April, 1818.] 6 *Ibid.* 325, 327, 328.

The 7th Volume contains the following provisions.

" CHAP. 112. An ACT authorizing the payment of certain certificates.

" [SECT. 1.] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That so much of an act, entitled "An Act making further provision for the support of public credit and for the redemption of the public debt," passed the third day of March, one thousand seven hundred and ninety-five, and so much of the act, entitled "An Act respecting loan office and final settlement certificates, indents of interest, and the unfunded and registered debt, credited on the books of the Treasury," passed the twelfth day of June, one thousand seven hundred and ninety-eight, as bars from settlement or allowance certificates, commonly called loan office and final settlement certificates, and indents of interest, be, and the same is hereby, suspended for the term of two years from and after the passing of this act, and from thence until the end of the next session of Congress; a notification of which temporary suspension of the act of limitation shall be published by the Secretary of the Treasury, for the information of the holders of the said certificates, in one or more of the public papers in each of the United States." [Approved, 7 May, 1822.] 7 *Ibid.* 85.

" CHAP. 149. An ACT supplementary to, and to amend, an Act, entitled "An Act to regulate the collection of duties on imports and tonnage," passed second March, one thousand seven hundred and ninety-nine, and for other purposes."

" SECT. 35. *And be it further enacted*, That all penalties and forfeitures, incurred by force of this act, shall be sued for, recovered, distributed, and accounted for, in the manner prescribed by the act, entitled "An act to regulate the collection of duties on imports and tonnage," passed on the second day of March, one thousand seven hundred and ninety-nine." [Approved. 1 March, 1823.] 7 *Ibid.* 113.

In suits, pending in the Courts of the United States ; to which neither the United States, their officers, nor agents, are parties, it appears that the Statutes of Limitations of the *State*, within which the suit is brought, are the Law by which those Courts are governed. The Act, entitled "An act to establish the Judicial Courts of the United States," [*Approved, September 24, 1789.*] contains the following provision.

"SECT. 34. *And be it further enacted*, That the laws of the "several states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." (*Laws of the U. S.* Vol. 2. p. 70.)

"CHAP. 20. [XX.] An act to establish the judicial courts of the United States."

SECT. 22, contains the following provision. "And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability." [*Approved September 24, 1789.*] 2 *Ibid.* 56, 64.



## NOTE (D.)

A Digest of the English Statutes of Limitations, chronologically arranged.

Statute of *Merton*, c. 8, 20 *Henry 3.* A. D. 1235.[<sup>1</sup>]

## "CAP. VIII.

"Several Limitations of Prescription in several Writs."

"Touching Conveyance of Descent in a Writ of Right from any Ancestor from the time of King *HENRY*, the elder, the Year and Day, it is provided, that from henceforth there be no Mention made of so long time, but from the time of King *HENRY* our Grandfather: (<sup>2</sup>) and this Act shall take effect at *Pentecost*, the One and twentieth Year of our Reign, and not afore, and the Writs before purchased shall proceed. (<sup>3</sup>) Writs of *Mortdauncestor*, of *Nativis*, and *Entre*, shall not pass the last Return of King *JOHN* from *Ireland* into *England*; and this Act shall take effect as before is declared. (<sup>4</sup>) Writs of *Novel disseisin* shall not pass the first Voyage of our Sovereign Lord the King, that now is, into *Gascoine*. And this Provision shall take his effect from the time aforesaid; and all Writs purchased before shall proceed."

Statute of *Westminster* 1. c. 39. 3 *Edward I.* A. D. 1275.[<sup>2</sup>]

## "CAP. XXXIX.

"Several Limitations of Prescription in several Writs."

"And forasmuch as it is long Time passed since the Writs undernamed were limited;" "it is provided, That in conveying a Descent in a Writ of Right, none shall presume to declare of the Seisin of his Ancestor further, or beyond the Time of King *RICHARD*, Uncle to King *HENRY*, Father to the King that now is; (<sup>2</sup>) and that a Writ of *Novel disseisin*, of Partition, which is called *Nuper obiit*, have their Limitation since the first Voyage of King *HENRY*, Father to the King that now is, into *Gascoin*. (<sup>3</sup>) And that Writs of *Mortdancestor*, of *Cosinage*, of *Aiel*, of Entry, and of *Nativis*, have their Limitation from the Coronation of the same King *HENRY*, and not before. (<sup>4</sup>) Nevertheless all Writs purchased now by themselves, or to be purchased between this and the Feast of St. *John*, for one Year compleat, shall be pleaded from as long Time, as heretofore they have been used to be pleaded."

[1] *Statutes at Large*, Vol. 1, page 19, (4to Ed.) ; Vol. 1, page 34, (8vo. Ed.)

[2] *Ibid.* Vol. 1, page 54, (4to Ed.) ; Vol. 1, page 101, (8vo. Ed.)

Statute of *Westminster* 2. c. 46. 13 *Edward* I. A. D. 1285.[<sup>1</sup>]

“CAP. XLVI.

“Lords may approve against their Neighbours. Usurpation of  
“Commons during the Estate of particular Tenants.”

“[<sup>4</sup>] It is ordained, That the Statute of *Merton*, provided between the Lord and his Tenants, from henceforth shall hold Place between Lords of Wastes, Woods, and Pastures, and their Neighbours, saving sufficient Pasture to their Tenants and Neighbours, so that the Lords of such Wastes, Woods, and Pastures, may make Approvement of the Residue.” “(<sup>10</sup>) And where one, having no Right to Common, usurpeth Common what Time an Heir is within Age, or a Woman is covert, or while the Pasture is in the Hands of Tenants in Dower, by the Courtesy, or otherwise for Term of Life, or Years, or in Fee-tail, and have long Time used the Pasture, many hold Opinion, that such Pastures ought to be said to belong to the Freehold, and that the Possessor ought to have Action by a Writ of *Novel disseisin*, if he be deforced of such Pasture; (<sup>11</sup>) but from henceforth this must be holden, that such as have entered within the Time that an Assise of *Mortdauncestor* hath lien, if they had no Common before, shall have no Recovery by a Writ of *Novel disseisin*, if they be deforced.”

Statute of 7 *Henry* 8. c. 3. A. D. 1515.[<sup>2</sup>]

Declared, “Within what Time all Actions, Suits, Bills, Indictments, or Informations popular shall be sued, either for the King, or for the Party.”

*Repealed*, by Statute of 31 *Elizabeth*, c. 5. sect. 7. A. D. 1589.[<sup>3</sup>]

Statute of 32 *Henry* 8, c. 2. A. D. 1540.[<sup>4</sup>]

“CAP. II.

“The Act of Limitation with a Proviso.

“Forasmuch as the Time of Limitation appointed for suing of Writs of Right, and other Writs of Possession and Seisin of Mens Ancestors or Predecessors, or of their own Possession or Seisin, by the Laws and Statutes of this Realm heretofore made, limited and appointed, extend, and be of so far and long Time past, that it is above the Remembrance of any living Man, truly to try and know the perfect Certainty of such Things, as hath or shall come in Trial, or do extend unto the Time and Times limited by the said Laws and Statutes, to the great Danger of Mens Consciences that have or shall be impannelled in any Jury for the Trial of the same; (<sup>2</sup>) and it is also a great

[1] *Statutes at Large*, Vol. 1. pp. 109, 110. (4to Ed.) ; Vol. 1. p. 210. (8vo. Ed.)

[2] *Ibid.* Vol. 2. p. 126. (4to Ed.) ; Vol. 3. p. 37. (8vo. Ed.)

[3] *Ibid.* Vol. 2. pp. 660, 661. (4to Ed.) ; Vol. 4. p. 451. (8vo. Ed.)

[4] *Ibid.* Vol. 2. p. 274. (4to Ed.) ; Vol. 3. p. 291. (8vo. Ed.)

"Occasion of much Trouble, Vexation and Suits to the King's  
 "loving Subjects at the common Laws of this Realm; so that no  
 "Man, although he and his Ancestors, and those whose Estate he  
 "or they have, have been in peaceable Possession of a long Sea-  
 "son, of and in Lands, Tenements and other Hereditaments, is or  
 "can be in any Surety, Quietness or Rest, of and in the same,  
 "without a good Remedy and Reformation be had, made and pro-  
 "vided for the same: (1) Be it therefore enacted by the King  
 "our Sovereign Lord, the Lords Spiritual and Temporal, and the  
 "Commons, in this present Parliament assembled, and by the  
 "Authority of the same, That no manner of Person or Persons  
 "shall from henceforth sue, have or maintain any Writ of Right,  
 "(2) or make any Prescription, Title or Claim of, to or for any  
 "Manors, Lands, Tenements, Rents, Annuities, Commons, Pen-  
 "sions, Portions, Corrodies or other Hereditaments, (3) of the  
 "Possession of his or their Ancestor or Predecessor, and declare  
 "and allege any further Seisin or Possession of his or their Ance-  
 "tor or Predecessor, but only of the Seisin or Possession of his An-  
 "cestor or Predecessor, which hath been, or now is, or shall be  
 "seized of the said Manors, Lands, Tenements, Rents, Annuities,  
 "Commons, Pensions, Portions, Corrodies or other Hereditaments,  
 "within threescore Years next before the *Teste* of the same Writ,  
 "or next before the said Prescription, Title or Claim so hereafter  
 "to be sued, commenced, brought, made or had.

"II. And be it further enacted by the Authority aforesaid, That  
 "no manner of Person nor Persons, shall hereafter sue, have or  
 "maintain any Assise or Mort-ancestor, Cosinage, Ayel, Writ of  
 "Entry upon Disseisin done to any of his Ancestors or Predeces-  
 "sors, or any other Action possessory, upon the Possession of any  
 "of his Ancestors or Predecessors, for any Manors, Lands, Tene-  
 "ments or other Hereditaments, of any further Seisin or Posses-  
 "sion of his or their Ancestor or Predecessor, but only of the  
 "Seisin or Possession of his or their Ancestor or Predecessor,  
 "which was, or hereafter shall be seized of the same Manors,  
 "Lands, Tenements or other Hereditaments, within fifty Years  
 "next before the *Teste* of the Original of the same Writ hereaf-  
 "ter to be brought.

"III. And be it further enacted by the Authority aforesaid,  
 "That no Person nor Persons shall hereafter sue, have or main-  
 "tain any Action for any Manors, Lands, Tenements, or other  
 "Hereditaments of or upon his or their own Seisin or Possession  
 "therein, above thirty Years next before, the *Teste* of the Ori-  
 "ginal of the same Writ hereafter to be brought.

"IV. And be it also enacted by the Authority aforesaid, That  
 "no Person nor Persons shall hereafter make any Avowry or Cog-  
 "nizance for any Rent, Suit or Service, and allege any Seisin of  
 "any Rent, Suit or Service in the same Avowry or Cognizance, in  
 "the Possession of his or their Ancestors or Predecessor or Pre-

“decessors, or in his own Possession, or in the Possession of any  
“other, whose Estate he shall pretend or claim to have above  
“fifty Years next before the making of the said Avowry or Cog-  
“nizance.

“V. And over that be it enacted by the Authority aforesaid, That  
“all Formedons in Reverter, Formedons in Remainder, and *Scire*  
“*facias*, upon Fines, of any Manors, Lands, Tenements, or other  
“Hereditaments, at any Time hereafter to be sued, shall be sued,  
“used and taken within fifty Years next after that the Title and  
“Cause of Action fallen, and at no Time after the said fifty Years  
“passed.

“VI. And be it also enacted by the Authority aforesaid, That  
“if any Person or Persons at any Time hereafter do sue any of the  
“said Actions or Writs, for any Manors, Lands, Tenements or other  
“Hereditaments, <sup>(2)</sup> or make any Avowry, Cognizance, Prescrip-  
“tion, Title or Claim of or for any Rent, Suit, Service or other  
“Hereditaments, <sup>(3)</sup> and cannot prove that he or they, or his or  
“their Ancestors or Predecessors, were in actual Possession or  
“Seisin of and in the same Manors, Lands, Tenements, Rents,  
“Suits, Services, Annuities, Commons, Pensions, Portions, Corro-  
“dies or other Hereditaments, at any Time or Times within the  
“Years before limited and appointed in this present Act, and in  
“Manner and Form as is aforesaid, <sup>(4)</sup> if the same be traversed  
“or denied by the Party Plaintiff, Demandant, or Avowant, or by  
“the Party Tenant or Defendant, that then and after such Trial  
“therein had, all and every such Person and Persons and their  
“Heirs, shall from henceforth be utterly barred for ever, of all  
“and every the said Writs, Actions, Avowries, Cognizance, Pre-  
“scription, Title or Claim hereafter to be sued, had or made, of  
“and for the same Manors, Lands, Tenements, Hereditaments or  
“other the Premises, or any Part of the same, for the which the  
“same Action, Writ, Avowry, Cognizance, Prescription, Title or  
“Claim hereafter shall be at any Time had, sued or made.

“VII. Provided alway, and be it enacted by the Authority  
“aforesaid, That all and every Person and Persons which now  
“have any of the said Actions, Writs, Avowries, *Scire facias*,  
“Cognizance, Prescription, Title or Claim depending, or that  
“hereafter shall sue, commence, make or bring any of the said  
“Writs or Actions, or make any of the said Avowries, Cognizan-  
“ces, Prescription, Titles or Claim, at any Time before the Feast  
“of the Ascension of our Lord God, which shall be in the Year  
“of our Lord God a thousand five hundred forty and six, shall al-  
“ledge the Seisin of his or their Ancestors or Predecessors, or  
“his own Possession and Seisin, and also have all other like Ad-  
“vantages to all Intents and Purposes in the same Writs, Actions,  
“Avowries, Cognizances, Prescriptions, Titles and Claims, as he  
“or they might have had at any Time before the making of this  
“Estatute; this Act or any Thing therein contained to the contra-  
“ry notwithstanding.



"VIII. Provided also, and be it further enacted by the Authority aforesaid, That if any Person or Persons now being within the Age of twenty-one Years, or covert Baron, or in Prison, or out of this Realm of *England*, now having Cause to have, sue, commence, make or bring any of the said Writs or Actions, or to make any Avowries, Cognizances, Prescriptions, Titles or Claims, that it shall be lawful to such Person or Persons being within Age, covert Baron, in Prison, or out of this Realm, to sue, commence, or bring any of the said Writs or Actions, or make any of the said Avowries, Cognizances, Prescriptions, Titles or Claims, at any Time within six years next after such Person or Persons, now being within Age, shall accomplish the Age of one and twenty Years, or within six Years next after such Person or Persons, now being covert Baron, shall be sole, or within six Years next after such Person or Persons, now being in Prison, shall be set at his Liberty, or within six Years next after such Person or Persons, now being out of this Realm, shall come and be within this Realm: (2) And that every such Person and Persons in their said Actions, Writs, Avowries, Cognizances, Prescription, Titles or Claims to be made, sued or commenced within the said six Years, shall allege within the six Years the Seisin of his or their Ancestors or Predecessors, or of his own Possession or of the Possession of those whose Estate he shall then Claim: (3) and also within the same six Years shall have all and every like Advantages to all Intents and Purposes in the same, as he or they might have had before the making of this Act, and as though this Act had never been had: no made; this Act nor any Thing therein contained to the contrary notwithstanding.

"IX. Provided also, That if it happen the said Person or Persons, now being within Age, or covert Baron, in Prison or out of this Realm, having cause to sue, commence, make or bring any of the said Writs, Actions, Avowries, Cognizance, Prescription, Title or Claim, to de cease within Age, or being covert, as is aforesaid, or during the Time he or they shall be in Prison or out of this Realm, or to de cease within six Years next after such Person or Persons shall accomplish his or their full Ages, or shall be at large within this Realm, or shall become sole, and no Determination or Judgment had of such Titles, Actions, or Rights, so to them accrued; that then the next Heir or Heirs of such Person or Persons being in Prison or out of this Realm, or within Age, or being covert Baron, so dying, shall have and enjoy all and every such Liberty and Advantage to sue, demand advow, declare or make their said Titles, Claims or Prescriptions within six Years next after the death of such Person or Persons now imprisoned or being out of this Realm, or within Age, or covert de Baron, in such or like Manner and Form to all Intents and Purposes, as the same Infant after his full Age, or the said Woman covert after the Death of her Husband, or

"the same Person being out of this Realm after his Repair or  
 "Coming into the same, or the said Person imprisoned after his  
 "Enlargement and coming out of Prison, should or might have  
 "had within six Years then next ensuing, by Force and Virtue of  
 "the Provision last before rehearsed; any Thing in this Act con-  
 "tained to the contrary thereof, in any wise notwithstanding.

"X. Provided also, That if any Person or Persons before the said  
 "Feast of the Ascension of our Lord God, which shall be in the  
 "said Year of our Lord God One thousand five hundred and forty-  
 "six, commence and sue any of the said Actions or Writs, or  
 "make any Avowry, Prescription, Title or Claim, and the same  
 "Action, Writ, Avowry, Cognizance, Prescription, Title or Claim  
 "happen, by the Death of any of the Parties to the same, to be  
 "abated before Judgment or Determination thereof had; that then  
 "the said Person or Persons, being Demandants or Avowants, or  
 "making any such Cognizance, Prescription, Title or Claim, being  
 "then alive, and if not, then the next Heir or Heirs of such Per-  
 "son or Persons so deceased, may commence and pursue his or  
 "their Action and Suit, and make his or their Avowry, Cognizance,  
 "Prescription, Title or Claim, for or upon the same Matter, within  
 "one Year next after such Action or Suit abated, and shall have  
 "and enjoy all and every such Liberty and Advantage to sue, de-  
 "mand, avow, declare or make their said Titles, Claims or Pre-  
 "scriptions, within the said one Year, as the Demandant or De-  
 "mandants in such suit or Writ abated, or as such as did avow  
 "or make Cognizances, Title or Claim, or Prescription, should or  
 "might have done; had, used, made or enjoyed in the said former  
 "Action or Suit; any Thing in this Act to the contrary not-  
 "withstanding.

"XI. Provided furthermore, That if any false Verdict happen  
 "hereafter to be given or made in any of the said Actions, Suits,  
 "Avowries, Prescriptions, Titles or Claims, that then the Party  
 "grieved by reason of the same shall and may have his Attaint  
 "upon every such Verdict so given or made, and the Plaintiff in  
 "the same Attaint, upon Judgment for him given, shall have his  
 "Recovery, Execution and other Advantage, in like Manner and  
 "Form as heretofore hath been used and accustomed; any Thing  
 "before in this Act contained to the contrary thereof notwithstand-  
 "ing."

Statute of 1 Mary, Session 2 c. 5. A. D. 1553.<sup>[1]</sup>

"An act for the Limitation of Prescriptions in certain cases."

Sections, 1, 2 & 3, Recite part of the Statute of 32 H. 8. c. 2.  
 touching Limitation of Prescription.

Section 4, states "Upon which said Act, Doubt and Ambiguity  
 "hath risen and been moved," and then proceeds:

[1] *Statutes at Large*, Vol. 2, p. 460. (1to. Ed.) Vol. 4, p. 11 (8vo. Ed.)



"(2) For the Explanation and plain Declaration whereof, and in  
 "avoiding of the said Ambiguities and Doubts, Be it enacted and  
 "declared by the Queen's Highness, with the Assent of the Lords  
 "Spiritual and Temporal, and the Commons in this present Par-  
 "liament assembled, and by the Authority of the same, That the  
 "said former Act made in the said xxxij. Year of the Reign of  
 "the said late King Henry, or any Article, Clause, Sentence or  
 "Matter therein contained, shall not extend to any Writ of Right  
 "of Advowson, *Quare Impedit* or Assise of *Darein Presentment*,  
 "nor *Jure Patronatus*; (4) Nor to any Writ of Right of  
 "Ward, Writ of Ravishment of Ward, for the Wardship of  
 "the Body, or for the Wardship of any Castles, Honours, Man-  
 "ors, Lands, Tenements or Hereditaments holden by Knights  
 "Service, nor to the Seisor of the Wardship of the Body of any  
 "Ward or Wards, or to the Seisor or Wardship of any Cas-  
 "tles, Honours, Manors, Lands, Tenements or Hereditaments  
 "holden by Knights Service; (5) But that all and every Person  
 "and Persons, Bodies Politick and Corporate, their Heirs and  
 "Successors, and the Heirs and Successors of every of them,  
 "shall and may have, maintain and pursue all and singular the  
 "said Writs of Right of Advowson, *Quare Impedit*, Assise  
 "of *Darein Presentment*, *Jure Patronatus*, Writs of Right of  
 "Ward, Ravishment of Ward, and also seise the Wardship both  
 "of the Body and of the Castles, Honours, Manors, Lands, Ten-  
 "ements and Hereditaments, holden by Knights Service, in like  
 "Manner and Form to all Intents, Constructions and Purposes, as  
 "they or any of them should or might have done, made or pur-  
 "sued, before the making of the said Act made in the said xxxij.  
 "Year, as though the same Act had never been had or made;  
 "any Thing in the said former Act to the contrary notwithstand-  
 "ing."

Statute of 31 Elizabeth, c. 5. A. D. 1589.[1]

"CAP. V.

"An Act concerning Informers.

"V. And be it further enacted by the Authority aforesaid, That  
 "all Actions, Suits, Bills, Indictments or Informations, which af-  
 "ter twenty Days next after the End of this Session of Parliament  
 "shall be had, brought, sued or exhibited, for any Forfeiture upon  
 "any Statute Penal made or to be made, whereby the Forfeiture  
 "is or shall be limited to the Queen, her Heirs or Successors only,  
 "shall be had, brought, sued or exhibited within two Years next  
 "after the Offence committed or to be committed against such  
 "Act Penal and not after two Years: (2) And that all Actions,  
 "Suits, Bills or Informations which after the said twenty Days

[1] *Statutes at Large*, Vol. 2 p. 660. (4to. Ed.) Vol. 4. p. 451. (8vo. Ed.)

"shall be had, brought, sued or commenced for any Forfeiture upon any Penal Statute made or to be made, except the Statute of Tillage, the Benefit and Suit whereof is or shall be by the said Statute limited to the Queen, her Heirs or Successors, and to any other which shall prosecute in that Behalf, shall be had, brought, sued or commenced by any Person that may lawfully pursue for the same as aforesaid, within one Year next after the Offence committed, or to be committed against the said Statute; <sup>(3)</sup> and in Default of such Pursuit, that then the same shall be had, sued exhibited or brought for the Queen's Majesty, her Heirs or Successors, at any Time within two Years after that Year ended. <sup>(4)</sup> And if any Action, Suit, Bill, Indictment or Information for any Offence against any Penal Statute made or to be made, except the Statute of Tillage, shall be brought after the Time in that Behalf before limited, That then the same shall be void and of none Effect; any Act or Statute made to the contrary notwithstanding.

"VI. Provided always, That where any Action, Information, Indictment or other Suit, is or shall be limited by any Statute Penal, to be had, sued, commenced or brought within shorter Time than is afore rehearsed; That in every such Case, the Action, Information, Indictment or other Suit shall be brought within the time limited by such Estatute.

"VII. And be it further enacted by the Authority aforesaid, That one Statute made in the seventh Year of the Reign of the late King of famous Memory, King *Henry* the Eighth, concerning the Time of bringing Actions or Informations upon Penal Laws, shall from and after twenty Days after the End of this Session of Parliament be utterly repealed."

Statute of 21 *James* 1. c. 2. A. D. 1623.[1]

"CAP. II."

"An Act for the general Quiet of the Subject against all Pretences of Concealment whatsoever."

Sect. 1. *Enacts*, "That the King's Majesty, his Heirs and Successors, shall not at any Time hereafter sue, impeach, question or implead any Person or Persons, Bodies Politick or Corporate, for or in any wise concerning any Manors, Lands, Tenements, Rents, Tithes or Hereditaments, other than Liberties and Franchises, or for or in any wise concerning the Revenues, Issues or Profits thereof, or make any Title, Claim, Challenge, or Demand, of in or to the same, or any of them, by reason of any Right or Title accrued and grown Threescore Years past and more, and now *in esse*, unless his Majesty or some of his Progenitors, Predecessors or Ancestors, or some other Person or

(1) *Statutes at Large*, Vol. 4. page 731. (8vo. Ed.)



"Persons, Bodies Politick or Corporate, under whom his Majesty any thing hath or lawfully claimeth, have been answered by force and virtue of any such Right and Title to the same, the Rents, Revenues, Issues or Profits thereof, within Threescore Years next before the Beginning of this Present Session of Parliament, or that the same have been duly in charge to his Majesty, or the late Queen *Elizabeth*, or have stood *insuper* of Record within the said Space of Threescore Years," &c.

Sect. 2. *Provides*, A Saving for the King's Title or Reversions, &c.

Sect. 3. *Provides*, That this Act shall not extend to any Manors, Lands, &c. granted by the King's Ancestors, &c. of limited Estate, &c.

Sect. 4. *Provides*, That Tenures or Services of Lands, &c. so granted "shall be holden of his Majesty, his Heirs and Successors," &c. And a "Saving to every Person and Persons, Bodies Politick and Corporate, their Heirs and Successors, (other than His most excellent Majesty, his Heirs and Successors, and other than all Patentees and Grantees of Concealments or defective Titles," &c. "All such Rights," &c. "as they or any of them had or ought to have had before the making of this Act," &c.

Sect. 5. *Provides*, a Saving for the King's Duty on Coal at Newcastle.

Sect. 6. *Provides*, That where Rents, &c. have been answered and paid to the King or his Predecessors within Sixty Years, the same shall be confirmed to his Majesty, &c. for time to come.

Statute of 21 *James* 1. c. 16. A. D. 1623.[<sup>1</sup>]

"An Act for Limitation of Actions, and for avoiding of Suits in Law."

(This act will be found at length, at page 1 to 5 inclusive, *ante*.)

Statute of 1. *William and Mary*, Session 1. c. 4. A. D. 1688.[<sup>2</sup>]

"CAP. IV."

"An Act for reviving of Actions and Process lately depending in the Courts at *Westminster*, and discontinued by the not holding of *Hilary* Term, and for supplying other Defects relating to Proceedings at Law."

"XIV. And forasmuch as since the tenth Day of *December*, One thousand six hundred and eighty-eight, the Chancery was not open, nor yet is, whereby the Subject was hindred from prosecuting any Original Writ :

"XV. Be it therefore enacted by the Authority aforesaid, That

(1) *Statutes at Large*, Vol. 4. page 751. (8vo. Ed.) Et Vide *Ante*, p. 1.

(2) *Ibid*. Vol. 5. page 501. (8vo. Ed.)

"no Part of the Time from the said tenth Day of *December* until the twelfth Day of *March*, One thousand six hundred eighty-six, shall be esteemed or accounted any Part of the six Months from the Time of the Avoidance of any Church, in which any Patron upon any Disturbance is bound to bring his Darreign Presentment, or *Quare Impedit*, or as any Part of the Time within which any Person or Persons, by virtue of any Statute for Limitation of Actions, ought to bring his or their Action or Actions: But that all and every Person or Persons shall have allowance of so much Time from the twelfth day of *March*, as did or shall incur between the said tenth Day of *December*, and the said twelfth day of *March*."

Statute of 7 & 8 *William 3.* c. 3. A. D. 1695.[<sup>1</sup>]

"CAP. III."

"An Act for regulating of Trials in Cases of Treason and Misprision of Treason."

"Section V. *Enacts*, That from and after the 25th day of *March*, 1696, "no Person or Persons whatsoever shall be indicted, tried or prosecuted, for any such Treason as aforesaid, or for Misprision of such Treason, that shall be committed," &c. after the said 25th day of *March*, 1696, "unless the same Indictment be found by a Grand Jury within three years next after the Treason or Offence done or committed."

"VI. And that no Person or Persons shall be prosecuted for any such Treason, or Misprision of such Treason, committed or done, within the Kingdom of *England*, Dominion of *Wales*, or Town of *Berwick* upon *Tweed*, before the said five and twentieth Day of *March*, unless he or they shall be indicted thereof within three Years after the said five and twentieth day of *March*; always provided and excepted, That if any Person or Persons whatsoever shall be guilty of designing, endeavouring or attempting, any Assassination on the Body of the King, by Poison or otherwise, such Person or Persons may be prosecuted at any Time, notwithstanding the aforesaid Limitation."

Statute of 10 & 11 *William 3.* c. 14. A. D. 1699.[<sup>2</sup>]

"CAP. XIV."

"An Act for limiting certain Times, within which Writs of Error shall be brought for the reversing Fines, common Recoveries and antient Judgments."

Sect. 1. *Enacts*, "That no Fine or common Recovery, nor any Judgment in any real or personal Action, shall from and after the first day of *May*, One thousand six hundred ninety-nine,

[1] *Statutes at Large*, Vol. 5, page 749, (8vo Ed.)

[2] *Ibid.* Vol. 6, page 210, (8vo. Ed.)

"be reversed or avoided, for any Error or Defect therein, "unless the Writ of Error or Suit for the reversing such Fine, "Recovery or Judgment, be commenced, or brought and prosecuted with Effect, within twenty Years after such Fine levied, or such "Recovery suffered, or Judgment signed or entred of Record."

Sect. 2. *Provides*, That any Person "within the age of twenty-one years, or Covert, *Non compos Mentis*, imprisoned, or beyond the Seas," "his or her Heirs, Executors or Administrators, (notwithstanding the said twenty Years expired) shall and "may bring his or their Writ of Error," &c. "as he, she, or they "might have done, in case this Act had not been made, so as the "same be done within five Years" after disability removed, "or "Death, but not afterwards, or otherwise."

Statute of 4 & 5 Anne, c. 16. A. D. 1705.<sup>[1]</sup>

"CAP. XVI."

"An Act for the Amendment of the Law, and the better Advancement of Justice."

Sect. 16. *Enacts*, That from and after the first day of *Trinity* Term, 1706, "no Claim or Entry to be made of or upon any "Lands," &c. "shall be of any Force or Effect to avoid any "Fine levied or to be levied with Proclamations," &c. "or shall "be a sufficient Entry or Claim within the Statute made in the "twenty-first Year of King James the First, intituled, *An Act for "Limitation of Actions, and for avoiding of Suits in Law*, "unless upon such Entry or Claim, an Action shall be commenced within one Year after the making of such Entry or Claim, "and prosecuted with Effect.

"XVII. And be it further enacted by the Authority aforesaid, "That all Suits and Actions in the Court of Admiralty for Seamen's Wages, which shall become due after the said first Day of *Trinity* Term, shall be commenced and sued within six Years next after the Cause of such Suits or Actions shall accrue, and "not after.

"XVIII. Provided nevertheless, and be it further enacted, "That if any Person or Persons, who is or shall be intitled to any "such Suit or Action for Seamen's Wages, be or shall be, at the "Time of any such Cause of Suit or Action accrued, fallen or come, within the Age of twenty-one Years, Feme Covert, *Non compos mentis*, imprisoned or beyond the Seas, that then such "Person or Persons shall be at Liberty to bring the same Actions, "so as they take the same within six Years next after their coming to, or being of full age, Discoverd, of sane Memory, at "large, and returned from beyond the Seas.

"XIX. And be it further enacted by the Authority aforesaid, "That if any Person or Persons, against whom there is or shall

[1] *Statutes at Large*. Vol. 6, page 530, (Evo. Ed.)

" be any such Cause of Suit or Action for Seamen's Wages, or  
 " against whom there shall be any Cause of Action of Trespass,  
 " Detinue, Actions Sur Trover, or Replevin for taking away  
 " Goods or Cattle, or of Action of Account, or upon the Case, or of  
 " Debt grounded upon any Lending or Contract without Specialty,  
 " of Debt for Arrearages of Rent, or Assault, Menace, Battery,  
 " Wounding and Imprisonment, or any of them, be or shall be,  
 " at the Time of any such Cause of Suit or Action given or accrued,  
 " fallen or come, beyond the Seas; that then such Person  
 " or Persons, who is or shall be entitled to any such Suit or Action,  
 " shall be at Liberty to bring the said Actions against such  
 " Person and Persons, after their Return from beyond the Seas, so  
 " as they take the same after their Return from beyond the Seas,  
 " within such Times as are respectively limited for the bringing  
 " of the said Actions before by this Act, and by the said other  
 " Act made in the one and twentieth year of the Reign of King  
 " *James the First.*"

Statute of 9 *George 3.* c. 16. A. D. 1769. [1]

" CAP. XVI."

" An Act to amend and render more effectual an Act made in  
 " the Twenty-first year of the Reign of King *James the First*, in-  
 " titled *An Act for the general Quiet of the Subjects against*  
 " *all Pretences of Concealment whatsoever.*"

Sect. 1. *Refers* to the act of 21 *Jac.* 1. c. 2. and limits the right  
 to the Crown to sue for Lands, &c. to *Sixty* years, &c. (Ex-  
 cept Liberties and Franchises, and Rents, &c. in charge of the  
 Crown.

Sect. 3. *Provides*, A *Saving* for the King's title to Rever-  
 sions, &c.

Sect. 4. *Provides*, That this Act shall not extend to any Man-  
 ors, Lands, &c. granted by the King's Ancestors, &c. of limited  
 Estate, &c.

Sect. 5 & 6, *Provide*, As in the 4th section of the act of 21 *Jac.*  
 1. c. 2.

Sect. 7. *Provides*, As in the 6th section of the act of 21 *Jac.* 1.  
 c. 2.

Sect. 8. *Provides*, For the rights of Persons to Lands, &c. by  
 virtue of any Grant, &c. from the Crown previous to the 1st of  
*January*, 1769; "so as such Right," &c. be prosecuted with  
 effect, "within the space of One Year," from the 1st of *January*,  
 1769.

Sect. 9. *Provides*, For the right of the Crown to Lands, &c.  
 within the Manor of *East Greenwich*; or within the *Savoy*; or

[1] *Statutes at Large*, Vol. 13. page 50. (Svo. Ed.)

to any Lands, "being the Estate and Possession of the late Hospital of *The Savoy*," &c. "So as such right," &c. be prosecuted with effect within the Space of Two Years from the 1st of *January*, 1769.

Statute of 27 *George 3.* c. 44. A. D. 1787.[1]

"CAP. XLIV."

"An Act to prevent frivolous and vexatious Suits in Ecclesiastical Courts."

Sect. 1. *Enacts*, "That, from and after the First Day of *August*, One thousand seven hundred and eighty-seven, no Suit for defamatory Words shall be commenced in any of the Ecclesiastical Courts within *England*, *Wales*, or the Town of *Berwick* upon *Tweed*, unless the same shall be commenced within Six Calendar Months from the time when such defamatory Words shall have been uttered."

"II. And be it further enacted by the Authority aforesaid, That no Suit shall be commenced in any Ecclesiastical Court, for Fornication or Incontinence, or for striking or brawling in any Church or Church Yard, after the Expiration of Eight Calendar Months from the time when such Offence shall have been committed; nor shall any Prosecution be commenced or carried on for Fornication at any time after the Parties, offending shall have lawfully intermarried."

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[1] *Statutes at Large*, Vol. 16. page 685. (8vo. Ed.)

## ADDENDA.

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Since this work was put to press, the Editor has received several Volumes of *American Reports*, most of them recently published ; such of the cases contained in them, as came too late for insertion in the several Chapters to which they properly belonged, are now given in the form of *Addenda*.

### CHAPTER 2.

Page 18 Note [2.] The Limitation of Suits for Land does not run against the Commonwealth. *Bagley & Al. vs. Wallace*. (*In Error*.) 16 *Serg. & R. Rep.* 245.

Page 20, Note [2.] In the State of *Maine*, "Where a person enters into possession under a *recorded* deed claiming title to the entirety, and exercises acts of ownership, it is a disseisin of all persons who claim title to the same land to the extent of the boundaries in the deed." *Prescott & Al. vs. Nevers & Al.*, 4 *Mason's Rep.* 326.

"After a sale of land by articles of agreement and payment of the purchase money, the vendee died, and his wife and children left the land ; the vendor placed a tenant on it, and the possession continued in him and those claiming under him, twenty-one years : *held* that it was erroneous to charge the jury that the putting on the tenant was not an ouster, unless they believed that the vendor intended to commit an ouster." *Pipher & Another vs. Lodge & Others*, 16 *Serg. & R. Rep.* 214.

Page 21, Note [1.] In the case of *Prescott & Al. vs. Nevers & Al.* (4 *Mason's Rep.* 326. 329.) STORV, J. *delivering the Opinion of the Court*, said ; "There is a distinction between disseisins, which are *in spite* of the owner, and disseisins at his election. But the distinction often turns upon other principles than those which have been stated. The owner cannot elect to consider himself disseised, where the act is not of such a nature as, in-law, affords a presumption of a disseisin. But where an act is done, which is equivocal, and may be either a trespass or disseisin, according to the intent, there the law will not permit the wrongdoer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it."

Page 27, Note [2.] "There can be no legal doubt, that one tenant in common may disseise another. The only difference between that and other cases is, that acts, which, if done by a stranger, would *per se* be a disseisin, are, in the case of tenancies in common, perceptible of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common necessarily acts of disseisin. It depends upon the intent, with which they are done, and their notoriety. The law will not presume that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established in proof." *Prescott & Al. vs. Nevers & Al.* 4 *Mason's Rep.* 330, (*Per STORY, J. delivering the Opinion of the Court.*)

## CHAPTER 4.

Page 86, Note [1.] *Darnall's Ex'rs. vs. Magruder*, June, 1827. (1 *Harris & Gill's Rep.* 439.)

"APPEAL from Prince George's County Court. Action of *assumpsit* brought on the 6th of April 1822, for money lent and advanced—money had and received—money laid out, expended and paid, and on an *insimul computassent*. The defendant, (the appellee,) pleaded *non assumpsit, non assumpsit infra tres annos*; and *actio non accrevit infra tres annos*. Issues joined on the general replications.

"At the trial the plaintiffs gave in evidence the following receipt signed by the defendant: "Received, June 3d, 1807, of Mr. John Darnall, the sum of two hundred and eleven dollars, which I hereby engage to return to him when called on to do so."  
*D. Magruder.*"

"Whereupon the defendant prayed the court to instruct the jury, that if they should be of opinion from the evidence in the cause, that three years had elapsed from the date of said paper before the impetration of the original writ in this cause, that then they must find a verdict for the defendant. Which opinion and instruction, the Court, [Stephen, Ch. J. and Key, A. J.] gave to the jury. The plaintiffs excepted; and the verdict and judgment being for the defendant, they appealed to this court.

"The cause was argued before BUCHANAN, Ch. J. and EARLE, and MARTIN, J.

"*Magruder*, for the Appellants, contended, that the act of limitations did not begin to run from the date of the instrument of writing, nor until demand of payment. He referred to 2 *Stark. Evid.* 891. *Collins vs. Benning*, 12 *Mod.* 444. He insisted that interest could be claimed only from the time demand was made of the money due.

"*C. Dorsey*, for the Appellee. The action is not on the instrument of writing; but is an action of general *indebitatus assumpsit*, which admits that the money was due at the time the promise was made. He cited *Bull. N. P.* 181. *Walmsley vs.*

" *Child*, 1 Ves. 344. 15 Vin. Ab. tit. *Limitation*, 103, pl. 14.

" *Wallis vs Scott*, 1 Stra. 88.

" THE COURT. No doubt interest might be demanded from the date of the instrument of writing ; and of course it became due and payable on the day of its date.

" JUDGMENT AFFIRMED."

The Act of Limitations begins to operate as a bar from the time the cause of action arises, and not from the time of making the promise. *Murdock vs. Winter's Admr.* 1 *Harris & Gill's Rep.* 471.

## CHAPTER 6.

Page 118, Note [1.] In the case of *Clowes vs. Dickenson & Al.* (On Appeal. 8 *Cowen's Rep.* 328,) it was *Held*, That a party may appeal from a final decree of the Court of Chancery, at any time within five years, though he have accepted the money awarded by the Decree. SPENCER, *Senator, in delivering his Opinion*, (page 331.) said ; " A defendant, in a judgment of the supreme court, has five years to bring error, although he might have stayed the collection of the judgment ; and a defendant in chancery has the same time for appeal, although he may have been obliged to pay the amount of the decree. It appears to me that these rights should be reciprocal ; and as the defendant may bring error or may appeal, notwithstanding he has paid the judgment or decree, I think the plaintiff has the same right, notwithstanding his acceptance of such payment. I am, therefore, of opinion that the motion be denied ; but without costs to either party." And COLDEN, *Senator*, (page 332.) said ; " As to the merits of this application, I cannot see that there is any thing in the lapse of time. The law has fixed the limitation at 5 years. Either party may prosecute an appeal at any time within this period. He may take the full indulgence of the law. As to the effect of payment, I had occasion to express my views in *Dyett v. Pendleton* ; and I feel confirmed, on reflection, that no matter how the money is paid or collected, this cannot affect the right to bring error or appeal. Every case cited on that occasion, where the courts have interfered with the writ of error, was either of express stipulation, or where the proceeding was most palpably unfounded and vexatious. Here is no agreement or stipulation pretended."

*The People ex relat. Phelps vs. Delaware Common Pleas.* (2 *Wend. Rep.* 256.) " Motion for a Mandamus. A plaintiff in a suit which had been carried up by appeal to the Delaware common pleas, was nonsuited. Five years afterwards, application was made to the common pleas to quash the appeal for a defect in the appeal bond, which was refused. A mandamus was now asked for, directing a vacatur of the rule refusing the application, and ordering the appeal to be quashed."



" *By the Court*, SUTHERLAND, J. The bond was palpably bad, and were the proceedings still *pendente lite* in the common pleas, an alternative mandamus would be awarded. But after the lapse of five years subsequent to the final decision of the cause, the court deem it inexpedient to interfere.

" Motion denied."

*The People*, ex relat. *Beach* vs. *Seneca Common Pleas*. (2 *Wend. Rep.* 264.) Motion for a *Mandamus*; " *By the Court*, SUTHERLAND, J. The motion is denied. Here has been a delay of a year since the happening of the errors complained of, and the fact of the party's having been advised that his remedy was by writ of error, furnishes no excuse. This court will not by mandamus disturb proceedings in which parties have so long acquiesced."

#### CHAPTER 9.

Page 189, Note [2.] "Where a declaration sets forth a claim or demand of the plaintiff against the intestate of the defendant, and the intestate's promise to pay it, a reference of such demand, by his administrator, (the defendant,) and the plaintiff, to arbitrators—an award, in pursuance of such reference, for a specific sum in favour of the latter—a promise by the defendant, as administrator, to pay it, and charges a breach in the nonpayment of that sum, it contains matter enough to warrant a judgment against the defendant in his character of administrator. The plaintiff is under no necessity to aver assets in the hands of the defendant, as administrator, sufficient to pay his debt.

"This peculiar mode of declaring originated in a plan to save the Statute of Limitations, and proceeds upon the ground, that it neither pledges the personal responsibility of the administrator after verdict, nor deprives him of any defence he could have had, if he had been charged with an *assumpsit* by his intestate; and with these qualifications, it will be received and adopted." *Gile's Adm'r. &c. vs. Perryman*, (1 *Harris & Gill's Rep.* 164.)

Page 188, Notes [1.] [2.] & [3.]; page 190, notes [1.] & [3.] page 191, note [1.]

In the case of *Oliver vs. Gray*, (1 *Harris & Gill's Rep.* 204, 215.) recently decided in the COURT OF APPEALS of Maryland, [June, 1827.] BUCHANAN, Ch. J. who delivered the Opinion of the Court, after a critical examination of the principal English and American decisions on the subject, said: "The only difference between the act of limitations in this state, and the Statute of *James* is, that here the limitation is but three years; and in this state, the rule prevailing in *England*, that an acknowledgment of the debt by the defendant within the time prescribed for bringing the suit, is sufficient to take the case out of the statute, has been adopted. In *Barney vs. Smith*. 4 *Harr. & Johns.* 485,

“ the venerable man who then presided, Judge *Chase*, said “ the act of limitations does not operate to extinguish the debt, but to bar the remedy. The act of limitations proceeds upon the principle, that from length of time a presumption is created, that the debt has been paid, and the debtor is deprived of his proof by the death of his witnesses, or the loss of receipts. It is the design of the act of limitations to protect and shield debtors in such a situation ; and consistent with this principle and this view, the decisions have been made, that the acknowledgment or admission of the debt will take the case out of the act of limitations ; because, if the money is still due and owing, the defendant has not suffered from the lapse of time, nor has any inconvenience resulted to him therefrom.” And again, in another part of his opinion, he says “ the acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar by the act of limitations, It does not create a new *assumpsit*, but is a saving of the remedy on the original promise.” We, therefore, are not called upon now for the first time to give a construction to that act ; that task has been performed by others, at whose hands we have received it, with their interpretation of it, from which, if we were disposed to do so, we should not feel ourselves at liberty to depart.

“ Perhaps it would have been better, if instead of endeavouring to rescue particular cases out of its operation, the letter of the statute had been strictly adhered to ; if the original debt had always been considered as extinguished, and the moral obligation, treated as a sufficient consideration for an express promise to pay, on which to found an action. But according to all the cases, (for in this at least they agree,) the debt is considered as not extinguished, and the defendant can only avail himself of the statute in *England*, and act of assembly here, by pleading it ; which, if he omits to do, it is held to be a waiver of its benefit, and the plaintiff may recover on the general issue, though the debt should appear by the declaration to be of longer standing than the limited period. This settled construction has produced all the difficulties and discrepancies complained of ; but it is a construction which is not now to be shaken by us ; nor on the other hand should its operation be extended further than it has already gone.

“ Taking the act of limitations, then, as we find it, operating upon the remedy only, and not as extinguishing the debt ; and feeling the necessity for a more definite and certain understanding of the effect of the adopted construction, than can easily be collected from particular cases, we will endeavour, not to reconcile the various decisions that are to be found in the books on this subject, but to lay down some general rules for the practical application of the principles they establish ; that the act does not extinguish the debt, but only bars the remedy, and that

" an acknowledgment by the defendant of the debt, or a promise to pay it within the time prescribed, is sufficient to revive the action.

" *First*, then, the suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only has the effect to restore the remedy; which is not only according to the common practice, but is directly and strongly asserted in *Barney vs. Smith*.

" *Second*. It need not be absolute and unconditional, but a conditional promise is sufficient; and in such case, it is incumbent on the plaintiff to show at the trial either a performance of the condition, or a readiness to perform it; as if the words be, prove your debt, and I will pay you, which is an express promise to pay, on condition that the debt is proved. *Heyling vs. Hastings*, 1 *Ld. Raymond*, 389. *Trueman vs. Fenton*, 2 *Cowper*, 548. *Davies vs. Smith*, 4 *Espinasse Rep.* 36. *Loweth vs. Fothergill*, 4 *Camp. Rep.* 185. *Busk vs. Barnard*, 8 *Johns. Rep.* 407. These cases furnish different examples of conditional promises to pay, each of which was held sufficient to take the case out of the statute.

" *Third*. An acknowledgment, to take the case out of the act of limitations, must be of a present subsisting debt, unaccompanied by any qualification or declarations, which, if true, would exempt the defendant from a moral obligation to pay. For the law will not raise an *assumpsit*, or imply a promise to pay, what in equity and good conscience a man is not bound to pay. As if the defendant admits the debt, but at the same time resists the payment of it by alleging that he has a set-off against it, and that the plaintiff owes him more money; which virtually amounts to a denial of his liability, and a refusal to pay any part of it, on grounds furnishing a sufficient moral excuse for not paying it. And indeed, taking the whole of the acknowledgment together, (which must always be done,) is in effect equivalent to a declaration that the debt is discharged. If it were otherwise, and the plaintiff was permitted to avail himself of the acknowledgment of the debt, and to reject the qualification, injustice would always be done where the set-off, claimed by the defendant, should be itself barred by the act, or he should be in want of testimony sufficient to support it. Or, if he admits the receipt of money, and that it has not been paid, but claims it as a gift; which, if true, would exempt him from any liability to pay. Or, if on being called upon, the party says he has paid the debt, and will furnish the receipt, but fails to do so, this will not be sufficient to charge him; but is the very case intended to be provided for by the act, the case of a man who is supposed to have lost his evidence of payment.

" *Fourth*. An acknowledgment of the debt, with a naked refusal to pay, or a refusal accompanied with an excuse for not

"paying it, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient.

"*Fifth.* Any unqualified acknowledgment of a present subsisting debt, or acknowledgment, with no other excuse for not paying it than a reliance on the bar created by the act of limitations, is sufficient to take it out of the act. *Clarke vs. Bradshaw & Coghlan*, 3 *Esp. Rep.* 155. *Bryan vs. Horseman*, 4 *East*, 599. *Evans*, in the notes to his translation of *Pothier on Obligations*, suggests to those whose claims are barred by the statute, and who wish to obtain an acknowledgment of the subsistence of the debt, the utility of filing a bill of discovery, and adds, 'if the subsistence of the debt is admitted, and without perjury it cannot be denied, it will not, if there is any consistency of decision, be of any avail to add a claim to the protection of the statute.'

"The act of limitations, according to the received construction, proceeds upon the supposition, that from length of time the debt is paid, and was only intended to protect a party where the presumption arising from lapse of time is, either, that the debt has been discharged, or never existed, and not to protect him from a debt acknowledged by himself to be still due and unpaid, with no other excuse for not paying it than the supposed bar created by the act. When, therefore, a party admits the debt to be due, but standing upon the act of limitations alone, in the same breath refuses to pay it, he admits a case, to which the act, according to its spirit and reason, does not apply, under the interpretation given to it, and his refusal cannot avail him. But the continuing existence of the debt continues and carries with it the implied *assumpsit* that the law raises, which is not rebutted by his refusal to pay. Hence the very common use in the books of the terms "takes the case out of the statute of limitations;" that is, that it is a case not embraced by the statute.

"*Sixth.* The acknowledgment of the debt may be in whole or in part.

"*Seventh.* It is sufficient if it be after the bringing of the suit. *Yea vs. Fouraker*, 2 *Burr.* 1099. Which could not regularly be if it stood upon the footing alone of evidence only of a new promise, the replication being *assumpsit infra tres annos* before the bringing of the suit, and confining the issue to a time within that period; so that an acknowledgment, made after the bringing of the suit, would not be within the issue. The issue, therefore, in such a case, must be sustained on the part of the plaintiff, on the idea of an implied promise, continuing and running with the old debt acknowledged to be still due.

"*Eighth.* An admission that the sum claimed has not been paid, is not sufficient without some further admission, or other proof, that the debt once existed.

" *Ninth.* The acknowledgment need not be made to the plaintiff himself, but may be made to any body else.

" *Tenth.* What kind of promise or acknowledgment is sufficient to take a case out of the act of limitations, is for the court to decide; and the evidence offered to prove such promise or acknowledgment, is proper to be submitted to the jury, as in other cases, under the direction of the court.

" It has been contended in this case, that where the defendant alleges the debt to have been discharged, and refers to a particular mode of discharge, the plaintiff may entitle himself to recover by disproving the mode of discharge referred to. We are aware that the same has been said elsewhere. In *Hellings vs. Shaw*, 2 *Serg. & Low*. 236, Chief Justice *Gibbs* said, "where the defendant has stated, not that the debt remained due, but that it was discharged by a particular means, to which he has with precision referred himself, and where he has designated the time and mode so strictly, that the court can say it is impossible it had been discharged in any other mode. There the court have said, if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely." But afterwards, in *Beale vs. Nind*, 6 *Serg. & Low*. 517, Justice *Bayley*, after reciting the words of Chief Justice *Gibbs*, says, "I certainly am not aware of the cases to which my Lord Chief Justice *Gibbs* refers to support that position." Thus strongly questioning the soundness of the proposition, to which, (seeing the inroads that have already been made upon the statute, which we are not disposed to push any farther, and no such decision having been made by this court,) we are not prepared to yield our assent; but think that every acknowledgment of a debt, which is offered to take a case out of the act of limitations, must be taken altogether; and that no evidence can be received to turn a denial of the existence of the debt into an acknowledgment of a subsisting liability, by proving that he was mistaken in supposing it to have been paid. Which would be to take a case out of the act of limitations by other proof than the acknowledgment of the party; for in such a case he manifestly not only does not intend to acknowledge a present subsisting debt, but in fact denies it, and there is nothing to carry, or on which the law can raise an implied *assumpsit*. The declarations of the defendant are the plaintiff's own proof, and if he chooses to introduce them, he must be content to take them as they are, and cannot be permitted to disprove them by other evidence, in order to raise an implied promise, or to furnish evidence of a promise to pay a debt, the existence of which is denied. With these views of the subject we do not think, from the evidence set out in the record, that the plaintiff is entitled to recover. Whatever might have been the effect of the expressions of regret by the defendant, if they stood alone, that the plaintiff had

“ been excluded from the deed of trust, and had not been allowed to come in for his claim,” the declarations, always accompanying them, “ that he did not consider that he was indebted to the plaintiff, because he had it in his power to have saved himself with the securities received from *William Taylor*, and ought not, therefore, to have looked to him for the money,” sufficient-ly show that it never was his intention to acknowledge the claim of the plaintiff as a subsisting debt due by him, but, on the contrary, taken together, amounted to a denial of any existing liability on him to pay; and for a reason, which, if true, furnished a real objection, and sufficient excuse for not paying it. For, if the plaintiff had in his hands securities with which he should and might have covered the amount of his claim, but from negligence or misapplication of the funds did not do so, he should not now look to the defendant for it; nor can he be permitted by evidence of the insufficiency of those securities to convert the defendant’s denial of his liability into an acknowledgment of a present subsisting debt.”

Page 191 note [1.] In the case of *Stafford vs. Bryan* (1 *Paige’s Rep.* 239, 241, 242.) WALWORTH, CH. in pronouncing his Decree, said; “ The only question, therefore, in this cause is, whether the recovery is barred by the statute of limitations. This suit was not commenced until nearly eight years after the acknowledgment and promise to Benedict; and although the complainant commenced two suits in the supreme court in the mean time, one of which was discontinued, and in the other he was nonsuited because he could not then prove sufficient to take the case out of the statute, neither of those suits can avail him any thing here.

“ The defendant is called upon by the complainant to answer whether he has not admitted his indebtedness, or promised to pay this demand, within six years previous to the commencement of this suit. In his answer, the defendant explicitly denies both and the answer being responsive to the bill, is evidence in his favor, and must be considered conclusive, unless disproved by more than one witness.” And after remarking upon the testimony, the CHANCELLOR added; “ There is not, therefore, sufficient in this case to satisfy me that the defendant has, within six years before the commencement of this suit, admitted that he owed, or promised to pay the note in question; and the admission in his answer of the giving the note, accompanied with the declaration of his belief that it had been paid, is certainly not sufficient to take the case out of the statute of limitations. (*Clemenson v Williams*, 8 *Craigh* 72.)

“ The complainant’s bill must therefore be dismissed with costs.”

## CHAPTER 10.

Page 208, note [1.] The Statute of limitations is a good Plea in bar, in equity as well as at law. *Stafford vs. Bryan*, 1 *Paige's Rep.* 239.

The defendant can only avail himself of the Act of Limitations, by pleading it; which if he omits to do, it is held to be a waiver of its benefit, and the plaintiff may recover, on the general issue, though the debt should appear by the declaration to be of longer standing than the limited period. *Oliver vs. Gray*, 1 *Harris & Gill's Rep.* 215, 216.

Page 218, note [1.] "Where in an action on a promissory note payable four months after date, the defendant pleaded *non assumpsit infra tres annos*, to which the plaintiff replied, that he at the time of making the promise, was beyond seas and without the jurisdiction of the court, and so remained and continued, &c. and the defendant demurred—Judgment was rendered for the plaintiff; for that mode of pleading the act of limitations in this case, is defective.

ARCHER, J. in delivering the Opinion of the court, said; "This mode of pleading the statute of limitations is in many cases not available; and *Williams* in his notes to *Hodsdon vs. Harridge*, 2 *Saunders*, 63, (note 6,) assigns as a reason, that if the cause of action accrued within six years, it is immaterial when the promise was made, because the statute operates as a bar only from the time the cause of action arose, and not from the time of making the promise, the words of the statute being 'within six years next after the cause of action accruing,' and not after, and he puts these cases in illustration of the principle. If a promissory note were made seven years ago to pay money within three years after, the statute is no bar; so if it were made seven years ago to pay money within three months after, though the statute would be a bar, yet the defendant must not plead *non assumpsit infra sex annos*, for that would be bad; but the plea must be *causa actionis non accrevit infra sex annos*. This last case is precisely the one presented here for our consideration, and must have the same rule applied to it; for the phraseology of the English statute, so far as concerns this point, is precisely in conformity with our statute of limitations. And it is recommended in the note referred to, as the safest and best mode in all cases of *assumpsit* where limitations attach to plead *actio non accrevit, &c.*" *Murdock vs. Winter's Admr.* 1 *Harris & Gill's Rep.* 471, 473.

## APPENDIX.

NOTE (A.) pages 385, 386.

In the case of *Bagley & Al. vs. Wallace*, (In Error,—16 *Serg. & R. Rep.* 245, 250.) the principal questions were, 1st. Whether

a purchase of Lands belonging to the Commonwealth, for which payment was made to, and a conveyance received from the proper officers of the Commonwealth, but the sale whereof was not made in the special mode appointed by Law, would pass the title of the Commonwealth? 2d. Whether a quiet possession for two score years, by honest purchasers, under such a conveyance, would be protected by the Statute of Limitations? The *Court below*, decided both questions in the *affirmative*; but *TOD, J. delivering the Opinion of the SUPREME COURT*, said; "This judgment appears to be erroneous. By the attainder of *Andrew Allen*, his lands, whether held by legal or equitable rights, were by the law vested in the commonwealth, to be sold by officers specially appointed, and in a special mode, *by auction, to the highest bidder*; and the officers appointed to that duty were to be bound by oath, not to be interested directly or indirectly, or to make any benefit by the forfeited estates. The officers of the land office were bound by this law, and could not appropriate the forfeited estates, or any part of them, by warrant and survey: nor could they confirm such appropriation by any act, or by any acquiescence. Warrant and survey were for vacant lands only. The title of *John Nicholson* was null and void, so far as it interfered with the estate forfeited by *Allen*.

"Then does the act of limitations help the case? We think not. The general rule is admitted, that the commonwealth is not bound by the statute; but it is said there is a distinction, that though the commonwealth is not bound in her sovereign right of original dominion, yet, as to every secondary or derivative right of property, she is bound by the act. This distinction cannot be admitted. It seems to be unknown to the law, and it would abolish the implied exception altogether, as far as it respects *Pennsylvania*; for it is supposed, the only title which the commonwealth can have in lands must be secondary or derivative.

"Admitting the title of the commonwealth, it is argued by the counsel of the defendant in error, that there exists no real cause to apprehend disturbance, by or under the commonwealth, to *Tiffany's* possession. They say, that such a thing never was heard of in *Pennsylvania*, and never will be, as an attempt by the government, to take from honest purchasers their property and their homes, after a quiet possession of two score years, on land twice purchased and paid for: first, from the old proprietaries, and then from the commonwealth, informally, indeed, but with the full knowledge of all the officers of government. All this I believe to be true. Indeed, I could almost say, I am sure it is all true, provided the facts are as stated. Yet, what we are to decide, is the question of title: and, we are bound to say, that *John Nicholson*, though a public officer, had no more right than any other person, to take up public lands against the express directions of the law. If any difference, his being comp-



"troller general, makes his title the worse. If innocent persons suffer, we can only regret that such is the law. It is not for the court to be generous, and to deal out by anticipation the liberality of the government. Several thousand acres are said to be held in the same manner with the tract in question. Then, probably, it is a subject important enough to attract the notice of the legislature."

NOTE (A.) page 371. In the case of *Walker & Al. vs. Walker & Al.*, (16 *Serg. & R. Rep.* 379, 384.) HUSTON, J. *who delivered the Opinion of the Court*, said; "The doctrine that the statute of limitations does not apply in cases of trust, has been much misunderstood. It only applies in cases of express trust, when the rights of trustee and *cestui que trust* make but one title; where there is a confidence, or was a confidence, between the parties; and even then I will not say it applies where the trustee openly and distinctly denies the right of *cestui que trust*, asserts his claim and title, and holds possession adverse to him with his knowledge, &c. But it never applied to implied trusts; to all those cases, where he who has the legal title denies and disclaims all trusts, claims and acts in all cases and in all respects as sole and exclusive owner: much less does it apply to cases where, along with such occupation and claim, the party has the legal title of record, and the trust is to be made out by old hearsays, vague recollections, and forgotten or abandoned claims."

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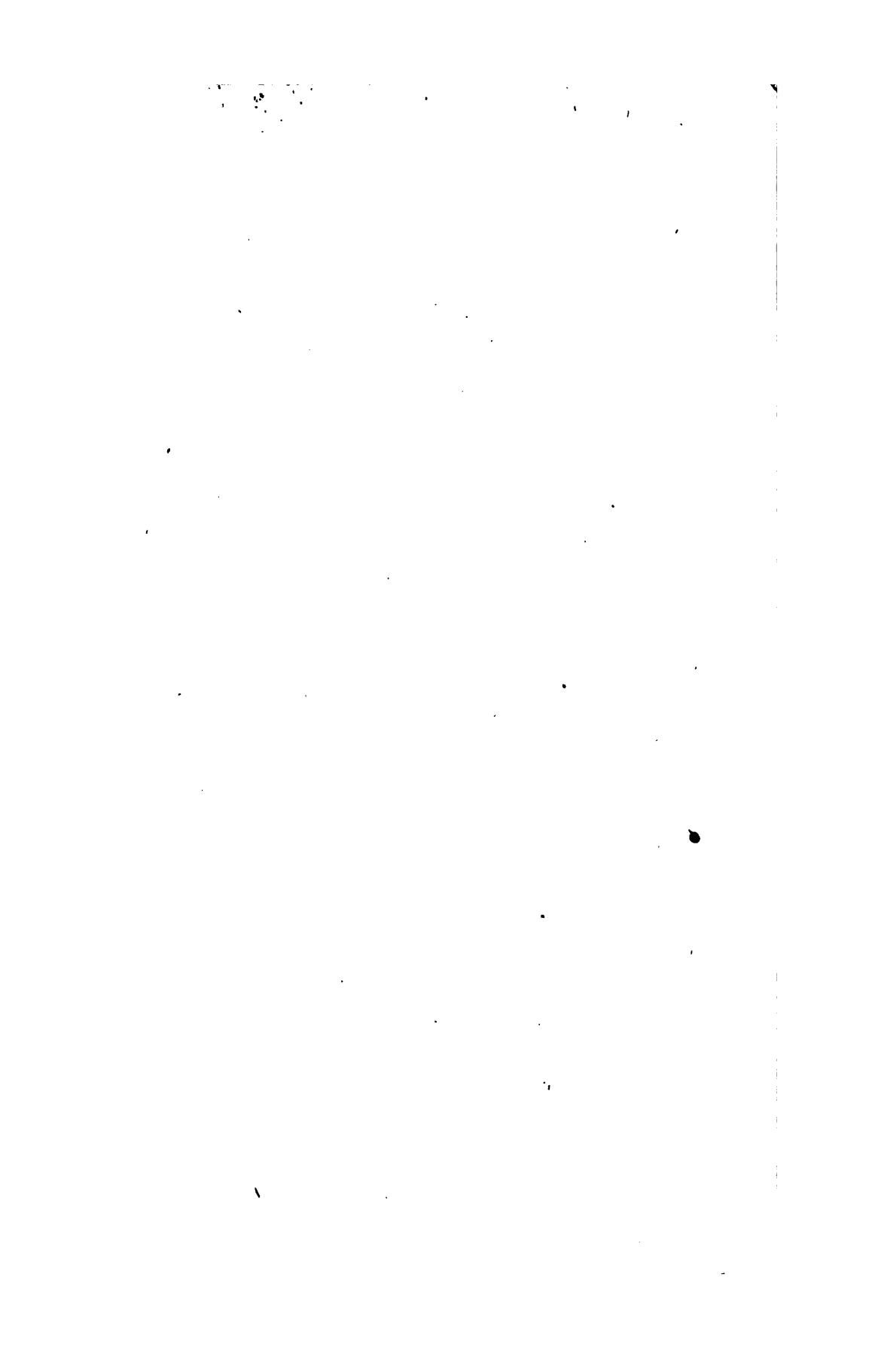
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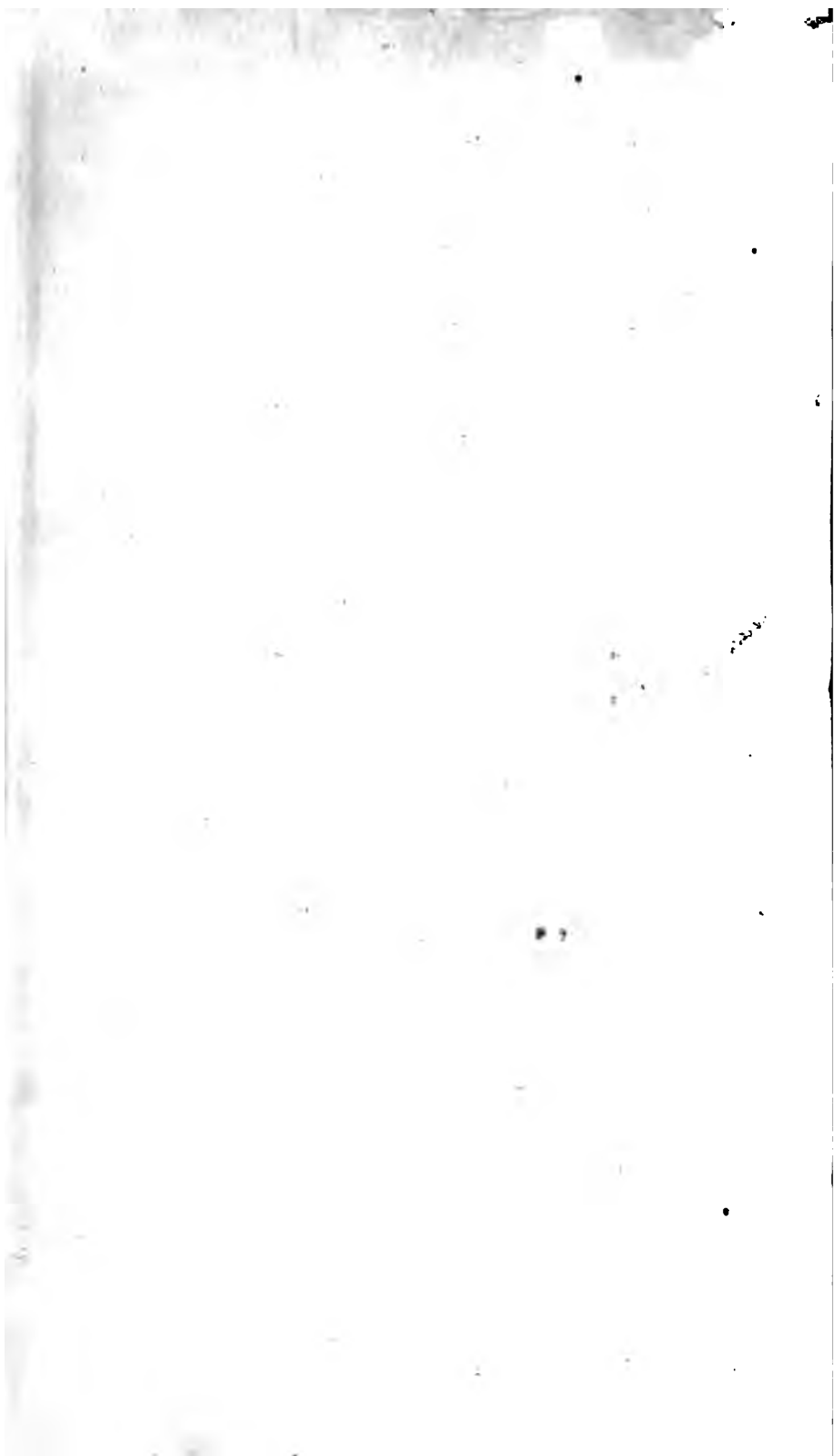
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